Wochnick, Heather M CIV USN (US)

From: Callaway, Rex CIV NAVFAC SW
Sent: Wednesday, June 09, 2010 15:27
To: Gilkey, Douglas E CIV OASN (EI&E), BRAC PMO West; Macchiarella, Thomas L CIV OASN (EI&E), BRAC PMO West; Forman, Keith S CIV OASN (EI&E), BRAC PMO West; Kito, Melanie R CIV NAVFAC SW; Cummins, John M CIV NAVFAC SW; Liotta, Rita M CIV WEST Counsel; Larson, Elizabeth A CIV OASN (EI&E), BRAC PMO West; Giangiuli, Jeff
Subject: FW: HPNS DeltaView Comparison(12).rtf ETCA
Attachments: DeltaView Comparison(12).rtf; DeltaView Comparison(12).rtf

Categories: Hunters Point

All:

I just received a revised draft ETCA from Barry Steinberg. (b) (5) [redacted] I'll defer to Doug and Thomas to set a deadline for reviewing it.

-Rex

-----Original Message-----
From: Steinberg, Barry P. [mailto:Barry.Steinberg@KutakRock.com]
Sent: Wednesday, June 09, 2010 11:44
To: Callaway, Rex CIV NAVFAC SW; Carr.Robert@epamail.epa.gov; Robert Elliott; Elaine Warren; Amy Brownell; Hart, Gordon E.; Hailstocke-Johnson, Ericka M.; Celena Chen; Joshua A. Bloom; Schlossberg, George R.
Subject: HPNS DeltaView Comparison(12).rtf ETCA

All,

Attached is a later version of the draft ETCA for your review and consideration at the upcoming (7/8 July) meeting. Sections 208 and 301i reflect new comments/changes.

Also attached is a later version of the draft AOC. The change identifies a need to define "Further Response Actions."

Barry

~~3/22/2010/2/26/~~May 18, 2010 Confidential
Sent for Navy Meeting

IN THE MATTER OF
FORMER HUNTER'S POINT NAVAL SHIPYARD

Respondents

San Francisco Redevelopment Agency and HPS Development Co., LP

ADMINISTRATIVE ORDER ON CONSENT
FOR RI/FS AND RD/RA FOR CLEANUP
OF PORTIONS OF THE FORMER HUNTER'S POINT NAVAL SHIPYARD
U.S. EPA Region 9

CERCLA Docket No.
Proceeding under Sections 104, 106 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9604, 9606, and 9622.

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I. JURISDICTION

1. This Administrative Order on Consent ("Order") is entered into voluntarily by the United States Environmental Protection Agency ("EPA"), the California Department of Toxic Substances Control ("DTSC"), the California Regional Water Quality Control Board, San Francisco Bay Region ("RWQCB"), and the San Francisco Redevelopment Agency ("SFRA") and CP/HPS Development Co. LP (referred to individually as "Respondent" and collectively as "Respondents"). The Order concerns the ~~preparation and~~ performance of one or more ~~remedial designs and~~ remedial actions ("RD/RA") for certain hazardous substances, pollutants, or contaminants present on Parcels G, and portions of Parcel B at the former Hunter's Point Naval Shipyard ("HPS") located at San Francisco ("Site"), described in Appendix A and depicted generally on the map attached as Appendix B) and the reimbursement for future response costs incurred by EPA, DTSC and RWQCB in connection with such CERCLA response actions.

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9604, 9606 and 9622 ("CERCLA"). This authority was delegated to the Administrator of EPA on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2926 (Jan. 29, 1987), and further delegated to Regional Administrators on May 11, 1994, by EPA Delegation Nos. 14-14-C and 14-14-D. This authority was further redelegated by the Regional Administrator of EPA Region 9 to the Superfund Branch Chief by Regional Delegation R9 1290.15, dated September 29, 1997. DTSC and the RWQCB sign this Order pursuant to relevant provisions of CERCLA Section 120 regarding state participation in federal facility cleanups, and Section 121(f), 42 U.S.C. §§ 9620 and 9621(f), and applicable provisions of 40 C.F.R. Subpart F, and the California Health and Safety Code, Division 20, Chapters 6.5, 6.67, 6.75, and 6.8, and the California Water Code, Division 7. The United States Department of Justice is approving and signing this Order pursuant to the authority of the Attorney General of the United States to compromise and settle claims of the United States.

3. Pursuant to that certain Early Transfer Cooperative Agreement ("ETCA") Covering Portions of the Hunters Point Naval Shipyard Between the United States of America Department of the Navy ("Navy") and the SFRA dated ____, and pursuant to that certain Remediation Agreement dated ____between the SFRA and HPS Development Co., Respondents have agreed to undertake the cleanup of a portion of the former Hunter's Point Naval Shipyard, which is more specifically depicted in Appendix A to this Order. This cleanup is currently being undertaken by the U.S. Navy pursuant to the terms of the Hunter's Point Naval Shipyard Federal Facilities Agreement, dated January 22, 1992 ("FFA"). The FFA is being amended to provide in general that the obligations of the Navy to conduct that portion of the cleanup of the Site that SFRA has agreed to perform under the ETCA and this AOCwill be suspended so long as the Respondents comply with all requirements of this Order and other conditions described in the Amended FFA are met [NOTE: SUBJECT TO REVIEW AND CONSENT OF AMENDED FFA TERMS]. In the event that EPA, in consultation with DTSC and

RWQCB, ~~shall determine~~determines that the Respondents are in Default as defined in Section XXXII of this Order, the responsibility for any remaining response actions shall revert to the Navy ~~and shall be undertaken by the Navy~~ in accordance with the terms and conditions of the Amended FFA.

4. Respondents represent that they are each bona fide prospective purchasers ("BFPP") with respect to the Site as defined by section 101(40) of CERCLA, 42 U.S.C. § 9601(40), that ~~it has~~they have and will continue to comply with section 101(40) during ~~its~~their ownership of the Site, and thus qualify for the protection from liability under CERCLA set forth in section 107(r)(1) of CERCLA, 42 U.S.C. § 9607(r)(1), with respect to the Site. In view, however, of the complex nature and significant extent of the Work to be performed by Respondents at the Site, and the risk of claims under CERCLA being asserted against Respondents notwithstanding section 107(r)(1) as a consequence of Respondents' activities at the Site pursuant to this Order, one of the purposes of this Order is to resolve, subject to the reservations and limitations contained in Section XXVI (Reservations of Rights by EPA), any potential liability of Respondents under CERCLA for Existing Contamination, as defined in Paragraph 13 below.

5. EPA, DTSC, RWQCB and Respondents recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Order do not constitute an admission of any liability. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Order, the validity of the Findings of Fact, and Conclusions of Law and Determinations in Sections V and VI of this Order. Respondents agree to comply with and be bound by the terms of this Order and further agree that they will not contest the basis or validity of this Order or its terms.

II. PARTIES BOUND

6. This Order applies to and is binding upon EPA, DTSC, RWQCB and upon Respondents and their successors and assigns. Any change in ownership or corporate status of Respondents including, but not limited to, any transfer of assets or real or personal property shall not alter Respondents' responsibilities under this Order, except as provided in Paragraph 20.

7. Each Respondent shall be responsible for carrying out the activities required of it by the ~~Scope~~Statement of Work and this Order in a timely manner and shall be subject to stipulated penalties for its failure to meet the terms and conditions of this Order. A Respondent may be held responsible for carrying out activities required of the other Respondent under the Scope of Work and this Order, but only after EPA, DTSC and RWQCB~~,~~ have exhausted their remedies under this Order against the non-performing Respondent; provided that a Respondent shall respond immediately where EPA determines, in consultation with DTSC and RWQCB, that an immediate response is required to protect human health and the environment. Where this Order specifies that Respondents have a right or duty, but does not specify which respondent has that right, or

duty, the Respondents may designate a single Respondent to exercise that right or perform that duty.

8. Respondents shall ensure that their contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. Respondents shall be responsible for any noncompliance with this Order by their contractors, subcontractors and representatives.

9. The undersigned representatives of Respondents certify that they are fully authorized to enter into the terms and conditions of this Order and to execute and legally bind Respondents to this Order.

III. STATEMENT OF PURPOSE

10. In entering into this Order, the objectives of EPA, DTSC, RWQCB and Respondents, in addition to the purpose identified in Paragraph 4 above, are: (a) to provide for the ~~design,~~ construction and implementation of the selected remedial action consistent with CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 ("NCP"), including the obligation to implement and maintain institutional controls, including land use covenants, or operation and maintenance at the Site to achieve all applicable or relevant and appropriate requirements not waived ("ARARs"), and other ~~Performance Standards~~Remedial Action Objectives described in the -RODs; (b) to provide for the payment of response and oversight costs incurred by EPA, DTSC and RWQCB with respect to this Order, provided that neither EPA, DTSC, nor the RWQCB will seek reimbursement from Respondents for any response and oversight costs already paid to them from a Department of Defense funding source; and (c) to fulfill a portion of the required assurances under the CERCLA 120(h)(3)(C) covenant deferral process.

12. The Work conducted under this Order is subject to approval by EPA, after consultation with DTSC and RWQCB. [NOTE: The issue of EPA's consultation with the Navy is to be addressed in the FFA amendment rather than the AOC]. For purposes of this Order, consultation with DTSC and RWQCB shall include, but not be limited to, simultaneous receipt by and a reasonable opportunity to review and comment on by DTSC and RWQCB of all documents and deliverables required to be submitted by Respondents under this Order (the reasonable review time for each document/deliverable will be determined by EPA in consultation with DTSC and the RWQCB before or upon receipt of the document/deliverable; opportunity to participate in all meetings among the Parties concerning the Site; and to participate in dispute resolution as provided by Sections XXII and XXIII of this Order. Respondents shall conduct all Work under this Order in compliance with CERCLA, the NCP, and all applicable EPA guidance, policies, and procedures and applicable State law.

IV. Definitions

13. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Order or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

"Amended FFA" shall mean Amendment No. 1 to the Hunter's Point Naval Shipyard Federal Facilities Agreement, dated _____.

"Additional Insured Conditions" shall mean those Pollution Conditions in the ACES that are not Cost Cap Insured Conditions but are otherwise within the coverage grant and not excluded from the Environmental Insurance Policies. This term also includes any Pollution Condition that otherwise would have been an Additional Insured Condition but for which coverage was denied by the insurance provider solely due to the failure of the Respondents to comply with any requirements as set forth in the Environmental Insurance Policies, but only to the extent of such specific costs that would have otherwise been funded by the Respondents but for such failure of the Respondents.

"CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C.§§ 9601, *et seq*.

"Certification of Completion of Remedial Action" shall mean a certification issued for a ROD Implementation Area ~~(~~after approval of a RACR (note: see new defined below) pursuant to ~~paragraph 63~~Paragraph 53.c or a certification for the entire Site issued pursuant to Paragraph ~~53~~53.d.

"Certification of Completion of the Work" shall mean a certification issued for ROD Implementation Area (defined below) pursuant to Paragraph ~~55~~55.c or a certification for the entire Site issued pursuant to Paragraph ~~55~~55.d.

"Cost Cap Insured Conditions" shall mean Pollution Conditions that are within the coverage grant and not excluded from the cost overrun insurance component of the Environmental Insurance Policies, and include such Pollution Conditions even after the expiration of the term of, or exhaustion of the limits of, the cost overrun insurance component of the Environmental Insurance Policies, except to the extent such Pollution Condition is a Navy-Retained Condition.

"Covenant Deferral Request" shall mean the document prepared in accordance with CERCLA Section 120(h)(3)(C), which provides the basis for the deferral by EPA, with the concurrence of the State, of the CERCLA covenant with respect to the Site.

"Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or State or Federal holiday. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or State or Federal holiday, the period shall run until the close of business of the next working day.

"DTSC" shall mean the Department of Toxic Substances Control and any successor departments or agencies of the State.

"DTSC Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that DTSC incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, or overseeing this Order including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, costs of participating in community relations meetings, legal or enforcement costs, costs to or implement institutional controls, including land use covenants, or operation and maintenance, including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation, costs for emergency response, or the costs incurred by DTSC in enforcing the terms of the Order, including all costs incurred in connection with Dispute Resolution pursuant to Sections XXII and XXIII in the Order"Effective Date" shall be the effective date of this Order as provided in Section XXXX.

~~"Environmental Services" shall mean the performance of the environmental response actions required by (1) EPA and the State under this AOC with respect to Known Conditions, Unknown Conditions and Added Conditions (if any) applicable to the Property.~~

"Environmental Services" shall mean activities funded by the ETCA solely with respect and limited to the Cost Cap Insured Conditions and Additional Insured Conditions necessary to obtain a Certification of Completion or Interim Certification of Completion and associated Operation and Maintenance activitites, except to the extent such Operation and Maintenance Activities are attributable to Navy-Retained Conditions. "Environmental Services" shall also mean any activity specifically identified herein, regardless of its exclusion from Insured Conditions. The term "Environmental Services" does not include the performance of Navy-Retained Condition or "Ineligible Work" as defined in the ETCA; any work associated with implementing amendments of, or Explanations of Significant Differences (ESDs) with, the CERCLA RODs; any work associated with the migration of a Pollution Condition from outside the Site onto, into, or under the Site; or any work associated with the migration of a Pollution Condition from the Site onto, into or under Parcel F, except to the extent such migration is caused or contributed to by the negligence of the Respondents.

Environmental Insurance Policies shall mean the environmental insurance ~~policy(ies) issued and approved pursuant to Section XXXXX and meeting the requirements of Section XXXXX below and attached as Appendix 4.~~which Respondents shall procure in accordance with the ETCA

"EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

"EPA Future Response Costs" shall mean all costs not inconsistent with the NCP, including, but not limited to, direct and indirect costs, that the EPA incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, costs of establishing and

maintaining the administrative record for a period of ___ years, or participating in community relations meetings, the costs incurred pursuant to Section XII (Access and Institutional Controls), including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation costs for emergency response, or the costs incurred by EPA in enforcing the terms of the Order, including all costs incurred in connection with Dispute Resolution pursuant to Sections XXII and XXIII in the Order [Navy Note: enforcement may be ~~precluded~~preculded—see 10 USC ~~270~~ 2701(d)(3)]

"ETCA" shall mean the Early Transfer Cooperative Agreement entered into by the Navy and the San Francisco Redevelopment Authority, San Francisco, California for the Site, dated ____, and attached hereto as Exhibit ___.

~~"Excluded Insured Conditions" shall mean those environmental conditions that are excluded from coverage under the terms of the insurance coverage grant, but do not include coverage denied due to the failure of SFRA or a named insured to satisfy the terms of the contract for insurance.~~

"Existing Contamination" shall mean:

1) any hazardous substances, pollutants or contaminants present or existing on or under the Site as of the Effective Date;

2) any hazardous substances, pollutants or contaminants that migrated from the Site prior to the Effective Date; and

3) any hazardous substances, pollutants or contaminants presently at the Site that migrate onto or under or from the Property after the Effective Date~~.~~

Existing Contamination includes, but is not limited to, Navy-Retained Conditions.

"FFA" shall mean the Hunter's Point Naval Shipyard Federal Facilities Agreement, dated January 22, 1992."Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

A definition is needed for "Further Response Actions."

"Interim Remedial Action Complete Report (IRACR)" shall mean a report prepared pursuant to the *DoD/EPA Joint Guidance, Remedial Streamlined Site Closeout and NPL Deletion Process for DoD Facilities* demonstrating that at a ROD Implementation Area where the remedy involving long-term operation of a groundwater or soil vapor remediation system, the system is constructed, in place, and is operating properly and successfully but the Remedial Action Objectives have not been attained.

"Institutional Controls" *[NOTE: No change, just moved to be in alphabetical order]* shall mean non-engineered instruments, such as administrative and/or legal

controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy by limiting land and/or resource use. Examples of institutional controls include easements and covenants, zoning restrictions, special building permit requirements, and well drilling prohibitions.

~~"Hunter's Point Special Account" shall mean the special account established at the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3).~~

"Interim Certification of Completion of Remedial Action" shall mean a certification issued for a ROD Implementation Area after approval of an I-RACR pursuant to paragraph 53.c.

"National Contingency Plan" or ANCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

"Navy Retained Conditions shall mean: (i) Unexploded Ordnance; Military Munitions; chemical, radiological or biological warfare agents; and Radiological Materials; (ii) the performance of CERCLA five-year reviews for years 2013 and 2018 for remedies selected in CERCLA RODs issued by the Navy; (iii) any activity identified as the responsibility of the Navy in the Amended FFA and (iv) Uninsured Conditions. The term Navy-Retained Conditions does not include Ineligible Work as defined in the ETCA.

"Operation and Maintenance" or "O & M" shall mean all activities required to maintain the effectiveness of the Remedial Action(s) as required by EPA, in consultation with DTSC and RWQCB, pursuant to this Order subsequent to and as a condition of the issuance of a Certification of Completion of Remedial Action or Interim Certification of Completion of Remedial Action.

"Order" shall mean this Administrative Order on Consent, the SOW, all appendices attached hereto (listed in Section XXXVI) and all documents incorporated by reference into this document, including without limitation EPA-approved submissions. EPA-approved submissions (other than progress reports) are incorporated into and become a part of the Order upon approval by EPA. In the event of conflict between this Order and any appendix or other incorporated documents, this Order shall control.

"Paragraph" shall mean a portion of this Order identified by an Arabic numeral or an upper case letter.

"Parties" shall mean EPA, DTSC, RWQCB and Respondents.

"Pollution Conditions" shall have the meaning set forth in the Environmental Insurance Policies.

"RACR" shall mean a report prepared pursuant to the *DoD/EPA Joint Guidance, Remedial Streamlined Site Closeout and NPL Deletion Process for DoD Facilities* demonstrating that (1) the remedy at a ROD Implementation Area has been fully performed, including recordation of a modification to the LUC(s), if required by EPA; (2) initial implementation of any other institutional controls called for in the ROD, and (3) the Remedial Action Objectives have been attained.

"Radiological Materials" shall mean solid, liquid, or gaseous material derived from U.S. Government activities, that contains radionuclides regulated by the Atomic Energy Act of 1954, as amended, and those materials containing radionuclides, including the following: nuclear propulsion plants for ships and submarines; nuclear devices and nuclear components thereof, and radiographic and instrument calibration sources and various instrumentation and radioluminescent products manufactured for military applications. The term "Radiological Materials" does not include products commonly used in non-military applications such as radioluminescent signs and household smoke detector components—that do not require special handling or treatment as a result of the materials containing radionuclides, or are otherwise subject to regulatory standards that would be applied in the absence of such radiological materials.

~~"***Performance Standards" shall mean the remedial action objectives set forth in the ROD(s) for Parcel B and Parcel G.*** "~~ "RCRA"" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. ' ' 6901 *et seq*. (also known as the Resource Conservation and Recovery Act).

"Record of Decision(s)" or "ROD(s)" shall mean that certain CERCLA Amended Record of Decision for Parcel B dated _____and that certain CERCLA Record of Decision for Parcel G dated _____. including all attachments thereto. The term "Record of Decision(s)" or "ROD(s)" shall not include any amendment, modification or supplement to the above-referenced Records of Decision except to the extent required as the result of any negligent act or omission of Respondents or their contractors. ***EPA – NOTE: [If not attributable to Respondents' negligence or omission, this would be Navy Retained].***

"Remedial Action" shall mean those activities, except for Operation and Maintenance, to be undertaken by the Respondents to implement each of the RODs in accordance with the SOW and the Remedial Design and Remedial Action Work Plans and other plans approved by EPA, after consultation with DTSC and RWQCB.

"Remedial Action Objective" Shall mean the numeric or narrative clean-up standard specifically designated in a ROD as the "remedial action objective" for a particular remedy selected in the ROD.

"Remedial Action Work Plan" shall mean the document(s) developed pursuant to Paragraph 29 of this Order and approved or modified by EPA, after consultation with DTSC and RWQCB, and any amendments thereto.

"Remedial Designs" shall mean that certain Remedial Design for Parcel B dated and that certain Remedial Design for Parcel G dated ___~~SUBSEQUENT RODA/ESD?~~.

~~"Remedial Design Work Plan" shall mean the document(s) developed pursuant to Paragraph 21 of this Order and approved or modified by EPA, after consultation with DTSC and RWQCB, and any amendments thereto.~~

~~"Navy Retained Conditions" means any condition or cost associated with Unexploded Ordnance; Military Munitions; chemical, radiological or biological warfare agents; Radiological Materials; and Uninsured Unknown Conditions. The term shall also include (i) the performance of CERCLA five year reviews for years 2013, 2018, 2023 and 2028 for remedies selected in a CERCLA ROD issued by the Navy, (ii) any other activity identified as the responsibility of the Navy in the Amended FFA; and (iii) any work associated with anamendment, modification or supplement to the RODs the Remedial Design except:~~

~~a. changes required by the Regulatory Agencies to the extent the costs arecovered by insurance, or~~

~~b.changes proposed by Respondents in order to allow for a reuse different than the reuse contemplated by the RODs or Remedial Designs being amended, modified, or supplemented;~~

~~c. changes attributed to the negligence or misconduct of Respondents.~~

"Risk Management Plans" or "RMPs" shall mean that certain Pre-RACR Risk Management Plan dated ___, and that certain Post-RACR Risk Management Plan dated ____, and any subsequent amendments thereto.

"ROD Implementation Area" shall mean the portions of Parcels B and G identified in Exhibit ___, attached hereto, as that Exhibit may be amended from time to time with the approval of EPA, in consultation with DTSC and the RWQCB, which form the geographic units for which Respondents will seek certification of completion pursuant to Section XVII

"RWQCB" shall mean the Regional Water Quality Control Board, San Francisco Bay Region, and any successor agencies of the State.

"RWQCB Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the RWQCB incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, or overseeing this Order including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, costs of participating in community relations meetings, legal or enforcement costs, including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to securecosts to establish or implement institutional controls including, but not limited to, the amount of just compensation~~,~~ costs for emergency response, or the costs incurred by the RWQCB in enforcing the terms of the Order, including all costs incurred in connection with Dispute Resolution pursuant to Sections XXII and XXIII in the Order~~.~~

"Section" shall mean a portion of this Order identified by a Roman numeral.

"Site" shall mean that portion of the Hunter's Point Naval Shipyard Superfund Site which Respondents have agreed to remediate in accordance with this Order, encompassing approximately ____ acres, described in Appendix A and depicted generally on the map attached as Appendix B. It is the intent of the Parties that the scope

of the "Site" shall be the same as the "Area Covered by Environmental Services" as that term is defined in the ETCA

"State" shall mean the State of California.

"State Interest" shall mean the interest rate applied to outstanding payments for costs billed pursuant to California Health and Safety Code section 25360.1. The rate of interest is subject to change.

"Statement of Work" or "SOW" shall mean the statement of work required of each Respondent for implementation of one or more Remedial Design(s) and Remedial Action(s) the Site, as set forth in Appendix C to this Order and any modifications made in accordance with this Order. The Statement of Work shall identify, for each element of Work, which Respondent is responsible for performing that element.

"Supervising Contractor" shall mean the principal contractor retained by the Respondents to supervise and direct the implementation of the Work under this Order.

"United States" shall mean the United States of America.

"Uninsured Conditions" shall mean those ~~environmental conditions~~Pollution Conditions that are not ~~"~~Cost Cap Insured Conditions or Additional Insured Conditions.~~"~~

~~"Insured Conditions" shall mean those environmental conditions at the Site that are not within the Insured scope of work but are otherwise within the insurance coverage grant of, the Environmental Insurance Policies. This term also includes an environmental Condition that otherwise would have been an Insured Condition but for which coverage was denied by the insurance provider solely due to the failure of the insured to comply with any Environmental Insurance requirements as set forth in the Environmental Insurance Policies ("Excluded Insured Condition"). The term "Insured Conditions" shall include Excluded Insured Conditions only to the extent of specific costs that would have otherwise been funded by the Environmental Insurance Policies but for such failure of an insured.~~

"Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); (4) any "hazardous waste" under California Health and Safety Code section 25117, or "hazardous substance" under California Health and Safety Code section 25316; and (5) any "waste" under California Water Code section 13050.

"Work" shall mean the activities with respect and limited to (1) the Cost Cap Insured ~~Scope of Work and~~Conditions, (2) Additional Insured Conditions and (3) such other specified activities that each Respondent is required to perform under this Order, except (1) those required by Section XXXIV (Retention of Records) (2) those aspects of a remedy which, after installation and implementation, require only periodic monitoring, inspection, enforcement, maintenance and repair. and (3) such further response actions selected pursuant to paragraph 29, except to the extent necessitated by the acts or omissions of Respondents.

V. FINDINGS OF FACT

14. Hazardous substances that have been released or that have the potential to be released within the Site include, but may not be limited to-_____ *NOTE: This has always been blank in our drafts. Who is going to fill in, and what kind of detail is expected?* which currently pose potential long-term risks to human health or the environment.

On January 22, 1992, the EPA, State of California Department of Health Services ("DHS") (now DTSC), and the Navy entered into a Federal Facilities Agreement requiring the Navy to identify, perform and complete all necessary response actions, including operation and maintenance at the former Hunter's Point Naval shipyard under CERCLA.

The Site contains ~~—~~16 known Installation Restoration Program sites ("IRP sites"). The Navy has signed a Record of Decision and an Amended Record of Decision to select a remedy for the IRP sites.

The former Hunter's Point Naval Shipyard was selected in 1992 for Base Realignment and Closure and was officially closed in ~~———~~.1974.

The SFRA has requested an early transfer of the Site, which it has or will acquire, upon EPA's approval of and the State's concurrence on the Covenant Deferral Request. All of the response actions undertaken by Respondents shall be performed under this AOC, as determined by EPA, with DTSC and RWQCB concurrence, pursuant to CERCLA and the NCP.

VI. CONCLUSIONS OF LAW AND DETERMINATIONS

15. Based on the Findings of Fact set forth above, and the Administrative Record supporting this Order, EPA has determined that:

a. The former Hunter's Point Naval Shipyard is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contamination found at the Site, as identified in the Findings of Fact above, includes "hazardous substances" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and Waste Materials as defined in Section IV of this Order.

c. Respondents are each "persons" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. The conditions described in Paragraph ~~13~~14 above constitute an actual or threatened release of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C.§ 9601(22), or a release of Waste Material, as defined in Section IV of this Order.

e. The response actions required by this Order are necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Order, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

VII. ADMINISTRATIVE ORDER

16. Based upon the foregoing Findings of Fact and Conclusions of Law and Determinations, it is hereby Ordered and Agreed that Respondents shall comply with the provisions of this Order, including, but not limited to, all appendices to this Order and all documents incorporated by reference into this Order.

VIII. GENERAL PROVISIONS

17. Commitments by Respondents.

Respondents shall finance, through the ~~***grant***~~ funds provided by the Navy pursuant to the ETCA and any proceeds from the Environmental Insurance Policies, and shall perform the Work in accordance with this Order, the SOW, the Records of Decision, and other decision documents applicable to the Site and associated with the Records of Decision, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Respondents and approved by EPA, in consultation with DTSC and RWQCB, pursuant to this Order. Respondents shall also reimburse EPA, DTSC and RWQCB for their respective Future Response Costs as provided in this Order.

18. Compliance with Applicable Law.

All activities undertaken by the Respondents pursuant to this Order shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Respondents must also comply with all applicable or relevant and appropriate requirements of federal and state environmental laws as set forth in the ROD(s) and the SOW. The activities conducted pursuant to this Order, if approved by EPA, shall be considered to be consistent with the NCP.

19. Permits

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-Site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work) and where such remedial

action is selected and carried out in compliance with Section 121 of CERCLA. Where any portion of the Work that is not on Site requires a federal or state permit or approval, Respondents shall submit timely and complete applications and take all other actions necessary to obtain all such permits and approvals.

b. The Respondents may seek relief under the provisions of Section XXI (Force Majeure) of this Order for any delay in the performance of the Work resulting from a failure to obtain, or delay in obtaining, any permit required for the Work.

c. This Order is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

20. Conveyance of Site.

a. At least 30 days prior to the conveyance of ~~any~~a fee interest ~~in property located within the Site including, but not limited to, fee interests and~~or leasehold interests in excess of 20 years~~)~~ to any portion of the Site. Respondents shall give written notice to EPA, DTSC, and RWQCB of the proposed conveyance, including the name and address of the grantee. Nothing in this Order shall be construed to require Respondents to secure the approval of EPA, DTSC, or RWQCB before transferring such interest

b. In the event of any such conveyance, Respondent's obligations under this Order~~, including, but not limited to, its obligation to abide by except obligations to implement institutional controls, pursuant to Section XII (Access and Institutional Controls) of this Order, if the responsibility for implementing such institutional controls has been transferred to the subsequent owner in an agreement approved and legally enforceable by Respondents EPA, DTSC and RWQB. Such conveyance shall release the obligation and liability of Respondents to comply with all. rovisions of this Orde with respect to institutional controls, absent the prior written consent of EPA, DTSC, and RWQCB. Obligation shall be unaffected., unless EPA, in consultation with DTSC and EPA, approves the transfer of the obligationsn of Respondents under this ~~order other than those relating to institutional controls may be transferred~~Order to a successor ~~with the approval of EPA~~. EPA's~~, DTSC's, and RWQCB's decisions~~ decision under this Paragraph 20.b. ~~are~~is in ~~their~~its sole discretion and shall not be subject to dispute resolution or judicial review. EPA will consider the following criteria, among others, in approving or disapproving a proposed successor for the Work under this Order: (i) the technical qualifications of the successor, or its proposed consultant, to perform remaining Work obligations; (ii) financial ability to perform such obligations; (iii) the successor's legal status and legal authority to sign the Order; (iv) the proposed successor's willingness to sign the Order without modification; and (v) assurance that the proposed transfer of Work obligations will not hinder or delay completion of the Work. If EPA, in consultation with DTSC~~,~~ and RWQCB approve a successor for the Work under this Order, EPA, DTSC, and RWQCB ~~may~~shall also provide covenants not to sue for the successor similar to those provided in Paragraphs ~~87~~77 and ~~90~~80 of this Order.

IX. PERFORMANCE OF THE WORK BY RESPONDENTS

21. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by the Respondents pursuant to Sections IX (Performance of the Work by Respondents), X (Remedy Review), XI (Quality Assurance, Sampling and Data Analysis), and XVIII (Emergency Response) of this Order shall be under the direction and supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by EPA, after consultation with DTSC and RWQCB. Respondent ***~~CPHPS~~HPS Development Company has proposed to use MACTEC as its Supervising Contractor and provided EPA, DTSC and RWQCB with the information meeting the criteria described in subparagraph b. below, including its qualifications and Quality Management Plans.*** MACTEC is not disapproved. NOTE: MACTEC to submit necessary information for review.

b. If at any time in the future, Respondents propose to change its Supervising Contractor, Respondents shall notify EPA, DTSC and RWQCB in writing at least sixty (60) days in advance of such change, and must obtain an authorization to proceed from EPA, after consultation with DTSC and RWQCB, before the new Supervising Contractor performs, directs, or supervises any Work under this Order. Respondents must provide the name, title, and qualifications of any contractor proposed to be Supervising Contractor. With respect to any contractor proposed to be Supervising Contractor, Respondents shall demonstrate that the proposed contractor has a quality system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/241/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA, after consultation with DTSC and RWQCB, will issue a notice of disapproval or an authorization to proceed.

c. If EPA disapproves a proposed Supervising Contractor, EPA will notify Respondents in writing. Respondents shall submit to EPA, DTSC and RWQCB a list of contractors, including the qualifications of each contractor that would be acceptable to them, within 30 days of receipt of EPA's disapproval of the contractor previously proposed. After consultation with DTSC and RWQCB, EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Respondents may select any contractor from that list that is not disapproved and shall notify EPA, DTSC and RWQCB of the name of the contractor selected within 21 days of EPA's authorization to proceed.

d. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents Respondents from meeting one or more deadlines in a plan approved by the EPA pursuant to this Order, Respondents may seek relief under the provisions of Section XXI (Force Majeure).

~~29.~~22. Remedial Action. With respect to each remedial action, the following procedures and requirements shall apply:

a. Within ___ days of the Effective Date of this Order, Respondents shall submit to EPA, DTSC and RWQCB a work plan for the performance of the Remedial Action at the Site ("Remedial Action Work Plan"). The Remedial Action Work Plan shall provide for construction and implementation of the remedy set forth in the relevant ROD and achievement of the ~~Performance Standards~~Remedial Action Objectives, in accordance with the ROD, this Order, the SOW, and the design plans and specifications developed in accordance with the Remedial Design Work Plan and approved by EPA after consultation with DTSC and RWQCB. Upon its approval by EPA, the Remedial Action Work Plan shall be incorporated into and become enforceable under this Order. At the same time as the Remedial Action Work Plan is submitted, Respondents shall submit to EPA, DTSC and RWQCB a Health and Safety Plan for field activities required by the Remedial Action Work Plan which conforms to the applicable Occupational Safety and Health Administration and EPA requirements, including but not limited to, 29 C.F.R. § 1910.120.

b. The Remedial Action Work Plan shall include the following which among other things shall provide for the complete initial installation of surface cover for all portions of the site for which RODs require a surface cover remedy no later than seven years after the Effective Date of this order: (1) schedule for completion of the Remedial Action; (2) schedule for developing and submitting other required Remedial Action plans; (3) methods for satisfying permitting requirements (4) methodology for implementation of the Operation and Maintenance Plan; (5) methodology for implementation of the Contingency Plan; (6) tentative formulation of the Remedial Action team; (7) construction quality control plan (by constructor); and (8) procedures and plans for the decontamination of equipment and the disposal of contaminated materials. The Remedial Action Work Plan also shall include the methodology for implementation of the Construction Quality Assurance Plan and a schedule for implementation of all Remedial Action tasks identified in the final design submittal and shall identify the initial formulation of the Respondents' Remedial Action Project Team (including, but not limited to, the Supervising Contractor).

c. Upon approval of the Remedial Action Work Plan by EPA, after consultation with DTSC and RWQCB, Respondents shall implement the activities required under the Remedial Action Work Plan. The Respondents shall submit to EPA, DTSC and RWQCB all plans, submittals, or other deliverables required under the approved Remedial Action Work Plan in accordance with the approved schedule for review and approval pursuant to Section XIV (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Respondents shall not commence physical Remedial Action activities at the Site prior to approval of the Remedial Action Work Plan.

~~30.~~23. The Respondents shall continue to implement the Remedial Action and Operation and Maintenance until the ~~Performance Standards~~Remedial Action Objectives are achieved and for so long thereafter as is otherwise required under this Order and the ROD.

~~31.~~24. Respondents acknowledge and agree that nothing in this Order, the SOW, or the Remedial Design or Remedial Action Work Plans constitutes a warranty or representation of any kind by EPA, DTSC or RWQCB that compliance with the work requirements set forth in the SOW and the Work Plans will achieve the ~~Performance Standards~~Remedial Action Objectives.

~~33.~~ 25. Except as expressly provided in the SOW (NOTEL to allow for revetment wall work) Respondents are not required to perform any Work under this Order on any property that is outside the boundaries of the Site or any Work associated with release of hazardous substances that have migrated onto, under or in the Site from a source outside the Site.

~~34.~~26. Waste Shipments.

a. For any Work performed under this Order, Respondents shall comply with all applicable State waste management laws.

b. For any Work performed under this Order, Respondents shall, prior to any shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA, DTSC and RWQCB Project Coordinators of such shipment of Waste Material. However, this notification requirement shall not apply to any off-site shipments to out-of-state waste management facilities when the total volume of all such shipments will not exceed 10 cubic yards.

c. The Respondents shall include in the written notification for out-of-state waste shipments the following information, where available: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Respondents shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

d. The identity of the receiving facility and state will be determined by the Respondents following the award of the contract for Removal Action or Remedial Action construction. The Respondents shall provide the information required by Paragraph ~~32.~~24.c. as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

~~35.~~27. Off-Site Waste Shipments. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-Site location, Respondents shall obtain EPA's certification that the proposed receiving facility is operating in compliance with

the requirements of CERCLA Section 121(d)(3) and 40 C.F.R. 300.440. If the off-Site location is in California, Respondents shall obtain certification from the State that the proposed receiving facility is in substantial compliance with California laws. Respondents shall only send hazardous substances, pollutants, or contaminants from the Site to an off-Site facility that complies with the requirements of the statutory provisions and regulations cited in the preceding sentences.

X. Remedy Review

~~36.~~28. Periodic Review.

For the duration of this Order, Respondents shall conduct any studies and investigations as requested by EPA, after consultation with DTSC and RWQCB, in order to permit EPA and/or the Navy to conduct reviews of whether any Remedial Action(s) is(are) protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations.

~~37.~~29. Selection of Further Response Actions.

If EPA and the Navy determine, at any time, after consultation with DTSC and RWQCB, that any Remedial Action at the Site is not protective of human health and the environment, EPA and the Navy may select further response actions for the Site in accordance with the requirements of the FFA, CERCLA and the NCP ("Further Response Actions").

a. Opportunity to Comment. For the duration of this Order, Respondents and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA and to submit written comments for the record during the comment period.

b. Limitations on Respondents's Obligation to Perform Further Response Actions. If EPA and the Navy select Further Response Actions for the Site, the Respondents shall have no obligation to undertake such Further Response Actions to the extent that such Actions are required as a result of Navy-Retained Conditions or to the extent such Actions are not part of the Environmental Services. Any requirement that Respondents undertake Further Response Actions shall be subject to Respondents' right to dispute resolution in accordance with Section XXIII. [NOTE: "Further Response Actions" would be a defined term in Section 13.]

c. Submissions of Plans. If Respondents are required to perform further response actions pursuant to Paragraph ~~37.~~29.b., Respondents shall submit a plan for such work to EPA for approval, in accordance with the procedures set forth in Section IX (Performance of the Work by Respondents) and shall implement the plan approved by EPA, after consultation with DTSC and RWQCB, in accordance with the provisions of this Order.

XI. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

~~38.~~30. Respondents shall use quality assurance, quality control, and chain of custody procedures for all assessment, characterization, treatability, design, compliance and monitoring samples in accordance with "Uniform Federal Policy for Quality Assurance Project Plans (UFP-QAPP) (EPA/505/B-04-900A, March 2005), "EPA Requirements for Quality Assurance Project Plans (QA/R5)" (EPA/240/B-01/003, March 2001) "Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/600/R-98/018, February 1998), and subsequent amendments to such guidelines upon notification by EPA to Respondents of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this Order, Respondents shall submit to EPA for approval, a Quality Assurance Project Plan ("QAPP") that is consistent with the SOW, the NCP and relevant guidance. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Order. Respondents shall ensure that EPA, DTSC and RWQCB personnel and their authorized representatives are allowed access at reasonable times to all laboratories utilized by Respondents in implementing this Order. In addition, Respondents shall ensure that such laboratories shall analyze all samples submitted by EPA, DTSC or RWQCB pursuant to the QAPP for quality assurance monitoring. Respondents shall ensure that the laboratories it utilizes for the analysis of samples taken pursuant to this Order perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis," dated February 1988 (collectively, "CLP-approved methods"), and any amendments made thereto during the course of the implementation of this Order; however, upon approval by EPA, after consultation with DTSC and RWQCB, the Respondents may use other analytical methods which are as stringent as or more stringent than the CLP- approved methods. Respondents shall ensure that all laboratories it uses for analysis of samples taken pursuant to this Order participate in an EPA or EPA-equivalent QA/QC program. Respondents shall only use laboratories that have a documented Quality System which complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), and AEPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA after consultation with DTSC and RWQCB. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (NELAP) as meeting the Quality System requirements. Respondents shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Order will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

~~39.~~31. Upon request, the Respondents shall allow split or duplicate samples to be taken by EPA, DTSC or RWQCB or their authorized representatives. Respondents shall notify EPA, DTSC and RWQCB not less than 28 days in advance of any sample

collection activity unless shorter notice is agreed to by EPA, after consultation with DTSC and RWQCB. In addition, EPA, DTSC and RWQCB shall have the right to take any additional samples that they deem necessary. Upon request, EPA shall allow the Respondents to take split or duplicate samples of any samples it takes as part of the EPA's oversight of the Respondents' implementation of the Work.

~~40.~~32. Respondents shall submit to EPA, DTSC and RWQCB two copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Respondents with respect to the Site and/or the implementation of this Order unless EPA agrees otherwise, after consultation with DTSC and RWQCB.

~~41.~~33. Notwithstanding any provision of this Order, the United States and the State, including DTSC and RWQCB, hereby retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

XII. ACCESS AND INSTITUTIONAL CONTROLS

~~42.~~34. As required in the covenant deferral process, certain restrictions on land/soil and groundwater use are needed to assure protection of human health and the environment at the time of transfer of the Site, and prior to and during the implementation of response actions at the Site. Accordingly, the Navy, EPA, DTSC and RWQCB have prepared, in consultation with Respondents, land use covenants ("LUCs") consistent with the requirements of the RODs for Parcels B and G~~.~~ ***~~Respondents shall refrain from using the Site in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of remedial measures and response actions to be performed pursuant to this Order and/or in accordance with the RODs~~***, and Respondents have prepared, and EPA, DTSC and RWQB have approved the Risk Management Plans.

a. Respondents shall comply with the use restrictions set forth in the LUCs and the requirements of the Risk Management Plans except to the extent Respondents obtain the approval of Navy, DTSC, EPA and RWQCB to allow an otherwise restricted use or activity pursuant to the approval procedures set forth in theLUCs or Risk Management Plans, respectively:

b. Respondents shall refrain from using the Site in any manne that would interfere with or adversely affect the implementation, integrity, or protectiveness of rememdial measures and response actions to be performed pursuant to this Order and/or in accordance with the RODs.

~~43.~~35. As of the Effective Date of this Order, if the Site is owned or controlled by Respondents, Respondents shall: provide the United States, including EPA and the Navy, and DTSC and RWQCB, and their representatives and contractors, with access at all reasonable times to the Site, for the purpose of conducting any activity related to this Order including, but not limited to, the following activities:

~~(1)~~ Monitoring the Work;

(2) Verifying any data or information submitted to EPA, DTSC and RWQCB;

~~(3)~~ (3) Conducting investigations relating to contamination at or near the Site;

(4) Obtaining samples;

(5) Assessing the need for planning or implementing response actions or additional response actions at or near the Site;

~~(6)~~ (6) Assessing implementation of quality assurance and quality control practices as defined in the approved Quality Assurance Project Plans;

(7) Implementing any response actions or the Work in the event of Default by Respondents;

~~(8)~~ (8) Inspecting and copying records, operating logs, contracts or other documents maintained or generated by Respondents or its agents, consistent with Section XXXIII (Access to Information);

(9) Assessing Respondents' compliance with this Order; and

(10) Determining whether the Site is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted by, or pursuant to this Order.

~~46.~~36. If EPA determines, after consultation with DTSC and RWQCB, that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement any remedies selected in the RODs, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Respondents shall cooperate with EPA's efforts to secure such governmental controls.

~~47.~~37. Notwithstanding any provision of this Order, the United States and the State, including DTSC and RWQCB, retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

XIII. REPORTING REQUIREMENTS

~~48.~~38. In addition to any other requirement of this Order, Respondents shall submit two copies of written monthly progress reports to EPA, DTSC and RWQCB that:

(a) describe the actions which have been taken toward achieving compliance with this Order during the previous month; (b) include a summary of all results of sampling and tests and all other data received or generated by Respondents or their contractors or agents in the previous month; (c) identify all work plans, plans and other deliverables required by this Order completed and submitted during the previous month; (d) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next six weeks and provide other information relating to the progress of construction, including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the work plans or other schedules that Respondents has proposed to EPA or that have been approved by EPA; and (g) describe all activities undertaken in support of the Community Relations Plan during the previous month and those to be undertaken in the next six weeks. Respondents shall submit these progress reports to EPA, DTSC and RWQCB by the tenth day of every month following the Effective Date of this Order until EPA notifies the Respondents pursuant to Section XVII (Certification of Completion). If requested by EPA, DTSC or RWQCB, Respondents shall also provide briefings for EPA, DTSC and RWQCB to discuss the progress of the Work.

~~49.~~39. The Respondents shall notify EPA, DTSC and RWQCB of any change in the schedule described in the monthly progress report for the performance of any activity, including, but not limited to, data collection and implementation of work plans, no later than seven days prior to the performance of the activity.

~~50.~~40. Upon the occurrence of any event during performance of the Work that is required to be reported pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act ("EPCRA"), the Respondent owning the property where the event occurred shall within 24 hours of the onset of such event orally notify the EPA, DTSC and RWQCB Project Coordinators or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response Section, Region 9, United States Environmental Protection Agency. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

~~51.~~41. Within 20 days of the onset of such an event, the Respondent owning the property where the event occurred shall furnish to EPA, DTSC and RWQCB a written report, signed by that Respondent's Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, that Respondent shall submit a report setting forth all actions taken in response thereto.

~~52.~~42. Each Respondent shall submit two copies of all plans, reports, and data required by the SOW, each Remedial Design Work Plan, each Remedial Action Work Plan, or any other document which that respondent is required to submit under the Scope of Work to EPA in accordance with the schedules set forth in such plans. The submitting

Respondent shall simultaneously submit two copies of all such plans, reports and data the Respondent is required to submit under the Scope of Work to DTSC and RWQCB. Upon request by EPA, DTSC or RWQCB, the submitting Respondents shall submit in electronic form all portions of any report or other deliverable Respondents are required to submit pursuant to the provisions of this Order.

~~53.~~43. All reports and other documents submitted by Respondents to EPA, DTSC and RWQCB (other than the monthly progress reports referred to above) which purport to document Respondents' compliance with the terms of this Order shall be signed by an authorized representative of the Respondents.

XIV. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

~~54.~~44. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Order, EPA, after consultation with DTSC and RWQCB, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the submitting Respondent modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing the submitting Respondent at least one notice of deficiency and an opportunity to cure within thirty (30) days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

~~55.~~45. In the event of approval, approval upon specified conditions, or modification by EPA, pursuant to Paragraph ~~54~~46(a), (b), or (c), the submitting Respondent shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to Respondents' right to invoke the Dispute Resolution procedures set forth in Section XXIII (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph ~~54~~46(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XXIV (Stipulated Penalties).

~~56.~~46. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Paragraph ~~52(d),~~44, the submitting Respondent shall, within thirty (30) days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XXIV, shall accrue during the 30-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraph 54.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph ~~54,~~44, the submitting Respondent shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation

of any non-deficient portion of a submission shall not relieve Respondents of any liability for stipulated penalties under Section XXIV (Stipulated Penalties).

~~57.~~47. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, after consultation with DTSC and RWQCB, EPA may again require the submitting Respondent to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the plan, report or other item. The submitting Respondent shall implement any such plan, report, or item as modified or developed by EPA, subject only to its right to invoke the procedures set forth in Section XXIII (Dispute Resolution).

~~58.~~48. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, the submitting Respondent shall be deemed to have failed to submit such plan, report, or item timely and adequately unless the submitting Respondent invokes the dispute resolution procedures set forth in Section XXIII (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XXIII (Dispute Resolution) and Section XXIV (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XXIV.

~~59.~~49. All plans, reports, and other items required to be submitted to EPA, DTSC and RWQCB under this Order shall, upon approval or modification by EPA, be enforceable under this Order. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Order, the approved or modified portion shall be enforceable under this Order.

XV. PROJECT COORDINATORS

~~60.~~50. Within 20 days of the Effective Date of this Order, each Respondent, DTSC, RWQCB and EPA will notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least 5 working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The Respondents' Project Coordinators shall be subject to disapproval by EPA, in consultation with DTSC and RWQCB, and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Respondents' Project Coordinators shall not be attorneys for the Respondents in this matter. They may assign other representatives, including other contractors, to serve as a representative for oversight of performance of daily operations during remedial activities.

~~61.~~51. EPA, DTSC and RWQCB may designate other representatives, including, but not limited to EPA, DTSC and RWQCB employees, and federal and state contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Order. EPA's Project Coordinator and Alternate Project

Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Order and to take any necessary response action when s/he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material. EPA's Project Coordinator, DTSC's Project Coordinator, RWQCB's Project Coordinator and the Respondents' Project Coordinators will meet, at a minimum, on a monthly basis.

XVI. Assurance of Ability to Complete Work

62.52. EPA, DTSC and RWQCB hereby acknowledge that the grant funds provided by the Navy pursuant to the ETCA and the Environmental Insurance Policies procured pursuant to the ETCA provide sufficient Financial assuranceAssurance of the Respondents' ability to complete the Work.

XVII. Certification of Completion

63. 53. *Certification and Interim Certification of* Completion of the Remedial Action. With respect to each ROD Implementation Area, the following procedures and requirements shall apply:

a. Within 90 days after Respondents conclude that the Remedial Action for a ROD Implementation Area has been either: (1) fully performed, including recordation of a modification to the LUC(s), if required by EPA, and initial implementation of any other institutional controls called for in the ROD, and the Performance Standards have been attained, Remedial Action Objectives have been attained, or (2), for remedies involving long-term operation of a groundwater or soil vapor remediation system, the system is constructed, in place, and is operating properly and successfully but the Remedial Action Objectives have not been attained, Respondents shall schedule and conduct a pre-certification inspection to be attended by Respondents, EPA, DTSC, RWQCB and the Supervising Contractor(s). If, after the pre-certification inspection, Respondents still believe that the Remedial Action has been fully performed and the Performance Standards have been attainedRemedial Action Objectives have been attained or for remedies involving long-term operation of a groundwater or soil vapor remediation system, the system is constructed, in place and is operating properly and successfully but the Remedial Action Objectives have not been attained,, Respondents shall, as applicable, submit to EPA for approval a written report requesting certificationRACR requesting Certification of Completion of Remedial Action or an I-RACR, requesting Interim Certification of Completion of Remedial Action, with a copy to the DTSC and RWQCB, pursuant to Section XIV (EPA Approval of Plans and Other

Submissions) within 30 days of the inspection. In the report, a professional engineer registered in the State and Respondents' Project Coordinator shall state that the Remedial Action for the ROD Implementation Area has been completed in full satisfaction of the requirements of this Order. The ~~written report~~RACR or I-RACR shall include as-built drawings signed and stamped by a professional engineer. The report shall contain the following statement, signed by a responsible official of Respondents or the Respondents' Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

b. If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after consultation with DTSC and RWQCB, determines, in the case of a RACR that the Remedial Action for the ROD Implementation Area or any portion thereof has not been completed in accordance with this Order or that the ~~Performance Standards~~Remedial Action Objectives have not been achieved, or in the case of an I-RACR, that the groundwater or soil vapor remediation system has not been constructed, or is not in place or is not operating properly and successfully, EPA will notify Respondents in writing of the activities that must be undertaken by Respondents pursuant to this Order to ~~complete the Remedial Action and achieve the Performance Standards, provided,~~fulfill the requirements for obtaining a Certification of Completion of Remedial Action or Interim Certification of Completion of Remedial Action, as applicable; provided however, that EPA may only require Respondents to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the scope of the remedy selected in the ROD. EPA will set forth in the notice a schedule for performance of such activities consistent with the Order and the SOW or require the Respondents to submit a schedule to EPA, DTSC and RWQCB for approval pursuant to Section XIV (EPA Approval of Plans and Other Submissions). Respondents shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to Respondents' right to invoke the dispute resolution procedures set forth in Section XXIII (Dispute Resolution.

If EPA concludes, based on the initial or any subsequent ~~report~~RACR or I-RACR requesting Certification of Completion of Remedial Action~~,~~ or Interim Certification of Completion of Remedial Action and after consultation with DTSC and RWQCB, that in the case of a RACR the Remedial Action has been performed in accordance with this Order and that the ~~Performance Standards have been achieved~~Remedial Action Objectives have been achieved, or in the case of an I-RACR, that the system is constructed, in place and is operating properly and successfully but the Remedial Action Objectives have not been attained, EPA will so certify in writing to Respondents. This certification shall constitute, as applicable, a Certification of Completion of ~~the~~ Remedial Action ~~for~~or, for remedies for which an I-RACR has been submitted, Certification of Completion of a ROD Implementation Area for purposes of this Order. Receipt of a Certification or Interim Certification under this Paragraph 53 of Completion of the Remedial Action shall not affect Respondent's obligations under this Order to perform required actions other than those necessary to obtain the Certification.

d. After EPA has issued a Certification of Completion of Remedial Action for each ROD Implementation Area within the Site, EPA shall certify in writing to Respondents that the Remedial Action for the entire Site has been performed in accordance with this Order and that the ~~Performance Standards~~Remedial Action Objectives have been achieved for the entire Site. This certification shall constitute a Certification of Completion of Remedial Action for the Site. *NOTE: We did not see a need for a Site-wide equivalent of an Interim Certification, so we did not include it in this paragraph d.)*

~~64.~~54. NPL Deletion.

After EPA has issued a Certification of Completion of Remedial Action for all of ROD Implementation Areas comprising Parcel G and/or for all of the ROD Implementation Areas comprising the portion of Parcel B within the Site, EPA will consider a request to initiate the regulatory proceedings necessary to effectuate a Partial Deletion from the National Priorities List of Parcel G and/or the portion of Parcel B within the Site from the Hunters Point Naval Shipyard Superfund Site.

~~65.~~55. Completion of the Work.

a. Within 90 days after Respondents conclude that all phases of the Work (including O & M for all Remedial Actions), have been fully performed for a ROD Implementation Area, Respondents shall schedule and conduct a pre-certification inspection to be attended by Respondents, EPA, DTSC and RWQCB. If, after the pre-certification inspection, the Respondents still believes that the Work has been fully performed for that ROD Implementation Area, Respondents shall submit a written report by a professional engineer registered in the State stating that the Work has been completed in full satisfaction of the requirements of this Order. The report shall contain the following statement, signed by a responsible corporate official of a Respondents or the Respondents' Project Coordinator:

> To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

b. If, after review of the written report, EPA, after consultation with DTSC and RWQCB, determines that any portion of the Work has not been completed for the ROD Implementation Area in accordance with this Order, EPA will notify Respondents in writing of the activities that must be undertaken by Respondents pursuant to this Order to complete the Work, provided, however, that EPA may only require

Respondents to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the scope of the remedy selected in the ROD. EPA will set forth in the notice a schedule for performance of such activities consistent with the Order and the SOW or require the Respondents to submit a schedule to EPA for approval pursuant to Section XIV (EPA Approval of Plans and Other Submissions). Respondents shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to Respondents' right to invoke the dispute resolution procedures set forth in Section XXIII (Dispute Resolution).

c. If EPA concludes, based on the initial or any subsequent request for Certification of Completion of the Work for the ROD Implementation Area by Respondents, and after consultation with DTSC and RWQCB, that the Work in that ROD Implementation Area has been performed in accordance with this Order, EPA will so notify the Respondents in writing. That written notification shall constitute the Certificate of Completion of the Work for the ROD Implementation Area.

d. After EPA has issued a Certification of Completion of the Work for each ROD Implementation Area within the Site, EPA shall certify in writing to Respondents that the Work for the entire Site has been performed in accordance with this Order. This certification shall constitute a Certification of Completion of the Work for the Site.

XVIII. EMERGENCY RESPONSE

~~66.~~56. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of hazardous substances at the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, the Respondent that owns the property where the release has been caused or threatened shall, subject to Paragraph ~~67,~~57, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify EPA's, DTSC's and RWQCB's Project Coordinators. If EPA's Project Coordinator is unavailable, EPA's Alternate Project Coordinator must be notified. If neither of these EPA persons is available, that Respondent shall notify the EPA Emergency Response Unit, Region 9. That Respondent shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Pre ~~and Post RACR~~ RMPs, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that the Respondents fail to take appropriate response action as required by this Section and EPA takes such action instead, Respondents shall reimburse EPA for all costs of the response action not inconsistent with the NCP, pursuant to Section XIX (Payments for Response Costs).

~~67.~~57. Nothing in the preceding Paragraph or in this Order shall be deemed to limit any authority of the United States or the State, including DTSC and RWQCB, to a) take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release

of hazardous substances on, at, or from the Site, or b) direct or order such action, or seek an order from a Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site.

XIX. PAYMENTS FOR EPA FUTURE RESPONSE COSTS

[Bob Carr indicated willingness to revise this model language, contingent on retaining advance payment requirement]

~~68.~~58. The amounts to be paid by Respondents pursuant to Paragraph ~~69~~59 shall be deposited in the HPS Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

~~69.~~59. Payments for EPA Future Response Costs.

a. Respondents shall pay to EPA all EPA Future Response Costs not inconsistent with the National Contingency Plan. Except as provided in Paragraph ~~69.~~59.c below, EPA will send Respondents, on a periodic basis, a bill requiring payment that includes a standard Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors**.** Respondents shall make all payments within 30 days of Respondents' receipt of each bill requiring payment, except as otherwise provided in Paragraph ~~70.~~60. Respondents shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making the payment, and EPA Site/Spill ID Number #XXXXX Respondents shall send the check(s) to:

U.S. Environmental Protection Agency
Attn: Region 9 Receivables
P.O. Box 371099M
Pittsburgh, PA 15251

b. At the time of payment under Paragraph 69.a or ~~69.~~59.c, Respondents shall send notice that payment has been made to EPA and to the Regional Financial Management Officer, in accordance with Section XXXV (Notices and Submissions).

c. Within 30 days of the Effective Date, Respondents shall pay to EPA $ [to be determined] in prepayment of anticipated EPA Future Response Costs. The total amount paid shall be deposited by EPA in the HPS Special Account, within the EPA Hazardous Substance Superfund. These funds shall be retained and used by EPA to conduct or finance future response actions. Respondents shall make the payment required by this Paragraph by a certified or cashier=s check or checks made payable to "EPA Hazardous Substance Superfund, " referencing the name and address of

the party making the payment, and EPA Site/Spill ID Number #XXXX Respondents shall send the check(s) to:

U.S. Environmental Protection Agency
Attn: Region 9 Receivables
P.O. Box 371099M
Pittsburgh, PA 15251

In the event that the payments required by this subparagraph are not made within 60 days of the Effective Date, Respondents shall pay Interest on the unpaid balance. The Interest on EPA Future Response Costs shall begin to accrue on the thirtieth day following the Effective Date. The Interest shall accrue through the date of the Respondents' payment.

~~[This suggests that stipulated penalties can be imposed for failing to make advance payments to EPA. That means that there would be interest assessed and penalties as well?]~~

d. After EPA issues its written Certification of Completion of Work and EPA has performed a final accounting of EPA Future Response Costs, EPA shall offset the final bill for EPA Future Response Costs by any unused amount paid by the Respondents pursuant to Paragraph ~~69.~~59.a or Paragraph ~~69.~~59.c. Any amount in excess of amounts due to EPA shall be returned to Respondents.

~~70.~~60. Respondents may contest payment of any EPA Future Response Costs under Paragraph ~~69~~59 if Respondents determines that EPA has made an accounting error or if Respondents alleges that a cost item that is included represents costs that are inconsistent with the NCP or if the cost is outside the definition of EPA Future Response Costs. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to EPA pursuant to Section XXXV (Notices and Submissions). Any such objection shall specifically identify the contested EPA Future Response Costs and the basis for objection. In the event of an objection, the Respondents shall within the 30-day period pay all uncontested EPA Future Response Costs to EPA in the manner described in Paragraph ~~69.~~59. Simultaneously, the Respondents shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State and remit to that escrow account funds equivalent to the amount of the contested EPA Future Response Costs. The Respondents shall send to EPA, as provided in Section XXXV (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested EPA Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Respondents shall initiate the Dispute Resolution procedures in Section XXIII (Dispute Resolution). If EPA prevails in the dispute, within 5 days of the resolution of the dispute, the Respondents shall pay the sums due (with accrued interest) to EPA in the manner described in Paragraph ~~69.~~59. If Respondents prevail concerning any aspect of the contested costs, the Respondents shall pay that portion of the costs (plus associated accrued interest) for

which Respondents did not prevail to the United States in the manner described in Paragraph ~~69~~59; Respondents shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XXIII (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Respondents' obligation to reimburse EPA for its EPA Future Response Costs.

~~71.~~61. In the event that the payments required by Paragraph ~~69.~~59.a. are not made within 30 days of the Respondents' receipt of the bill, Respondents shall pay Interest on the unpaid balance. The Interest on EPA Future Response Costs shall begin to accrue on the date of the bill. ~~The Interest shall accrue through the date of the Respondents payment. The Respondents shall make all payments required by this Paragraph in the manner described in Paragraph 69.~~

~~72.~~62. Payment of DTSC Future Response Costs.

a. As of the Effective Date of this Order, Respondents shall pay all of DTSC's Future Response Costs related to the Work performed under this Order. DTSC will bill Respondents quarterly for its response costs. Respondents shall pay DTSC within sixty (60) days of date of invoice. Any billing not paid within sixty (60) days is subject to State Interest calculated from the date of the invoice pursuant to California Health and Safety Code section 25360.1. All payments made by Respondents pursuant to this Order shall be by cashier's or certified check made payable to "DTSC," and shall bear on the face the project code of the Site (Site ____) and the Docket number of this Order. Payments shall be sent to:

Department of Toxic Substances Control
Accounting/Cashier
1001 I Street, 21st Floor
P.O. Box 806
Sacramento, California 95812-0806

A photocopy of all payment checks shall also be sent to the person designated by DTSC to receive submittals under this Order.

b. If Respondents disputes a DTSC billing, or any part thereof, Respondents shall notify DTSC's assigned project manager and attempt to informally resolve the dispute with DTSC's project manager and branch chief. If Respondents desires to formally request dispute resolution with regard to the billing, Respondents shall file a request for dispute resolution in writing within 45 days of the date of the billing in dispute. The written request shall describe all issues in dispute and shall set forth the reasons for the dispute, both factual and legal. If the dispute pertains only to a portion of the costs included in the invoice, Respondents shall pay all costs which are undisputed in accordance with Subparagraph ~~72.~~62.a. The filing of a notice of dispute pursuant to this Paragraph shall not stay the accrual of DTSC interest on any unpaid costs pending resolution of the dispute. The written request shall be sent to:

Special Assistant for Cost Recovery and Reimbursement Policy
Department of Toxic Substances Control

P.O. Box 806
Sacramento, CA 95812-0806

A copy of the written request for dispute resolution shall also be sent to the person designated by DTSC to receive submittals under this Order. A decision on the billing dispute will be rendered by the Special Assistant for Cost Recovery and Reimbursement Policy or other DTSC designee.

~~73.~~63. Payment of RWQCB Future Response Costs

a. As of the Effective Date of this Order, the Respondents are liable for all of the RWQCB's costs related to the Work performed under this Order in responding to the hazardous materials at the Site. Cost recovery may be pursued by the RWQCB under CERCLA, California Health and Safety Code Sections 25187.2 and 25360, California Water Code Sections 13304 and 13365, or any other applicable state or federal statute or common law. The RWQCB will bill the Respondents quarterly for oversight activities performed by the RWQCB hereunder. The Respondents shall pay the RWQCB within sixty (60) days of receipt of the RWQCB's billing. Any billing not paid within sixty (60) days is subject to State Interest calculated from the date of the billing pursuant to California Health and Safety Code section 25360.1. All payments made by the Respondents pursuant to this Order shall be by cashier's check or certified check made payable to the RWQCB and shall bear on the face the project code of the Site. Payments to the RWQCB shall be sent to:

State Water Resources Control Board
SLIC Program
P.O. Box 944212
Sacramento, CA 94244-2120

A photocopy of all payment checks shall also be sent to the person designated by the RWQCB to receive submittals under this Order.

b. If Respondents disputes a RWQCB billing, or any part thereof, Respondents shall notify the RWQCB's assigned project manager and attempt to informally resolve the dispute with the RWQCB's project manager and immediate supervisor. If Respondents desires to formally request dispute resolution with regard to the billing, Respondents shall file a request for dispute resolution in writing within 45 days of the date of the billing in dispute. The written request shall describe all issues in dispute and shall set forth the reasons for the dispute, both factual and legal. If the dispute pertains only to a portion of the costs included in the invoice, Respondents shall pay all costs which are undisputed in accordance with Subparagraph ~~73.~~63.a. The filing of a notice of dispute pursuant to this Paragraph shall not stay the accrual of RWQCB interest on any unpaid costs pending resolution of the dispute. The written request shall be sent to:

RWQCB Address/POC

A copy of the written request for dispute resolution shall also be sent to the person designated by the RWQCB to receive submittals under this Order. A decision on the billing dispute will be rendered by Mr. Landau, or his designee.

XX. INDEMNIFICATION AND INSURANCE

~~74.~~64. Respondents' Indemnification of the United States and State.

a. The United States does not assume any liability by entering into this agreement ~~or by virtue of any designation of Respondent SFRA as EPA's authorized representative under Section 104(e) of CERCLA, if applicable~~. Respondents shall indemnify, save and hold harmless the United States and the State and their officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Order~~, including, but not limited to, any claims arising from any designation of Respondents as EPA's authorized representative under Section 104(e) of CERCLA, if applicable~~. Further, the Respondents agree to pay the United States and the State all costs they incur including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State based on negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Order. Neither the United States nor the State shall be held out as a party to any contract entered into by or on behalf of Respondents in carrying out activities pursuant to this Order. Neither the Respondents nor any such contractor shall be considered an agent of the United States or the State.

b. The United States and the State shall give Respondents notice of any claim for which the United States or the State plans to seek indemnification pursuant to Paragraph ~~74.~~64.a. and shall consult with Respondents prior to settling such claim.

c. Nothing in this Paragraph 64 or Paragraph 65 shall be construed to waive or in any way limit any rights Respondents may have against the United States as a result of acts or omissions for which the United States Navy is responsible, including but not limited to rights under CERCLA or Section 330 of the FY 1992 National Defense Authorization Act, as amended or under the Conveyance Agreement for Hunters Point Shipyard between the United States Navy and SFRA on _____, or under any deed to be executed by the Navy for any portion of the Site.

~~75.~~65. Respondents waives all claims against the United States and the State, including DTSC and RWQCB, for damages or reimbursement or for set-off of any payments made or to be made to the United States or DTSC and RWQCB arising from or on account of any contract, agreement, or arrangement between Respondents and any

person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, -Respondents shall indemnify and hold harmless the United States and the State, including DTSC and RWQCB, with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondents and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays, provided, however, that nothing herein shall limit Respondents' right to claim that any delays caused by the United States and/or State, including the DTSC and RWQCB, constitute a force majeure event under this Agreement.

~~76.~~66. No later than 15 days before commencing any on-site Work, Respondents shall secure, and shall maintain until the first anniversary of EPA's last Certification of Completion of the Remedial Action applicable to the Site pursuant to Section XVII (Certification of Completion), comprehensive general liability insurance with limits of five (5) million dollars, combined single limit, and automobile liability insurance with limits of one (1) million dollars, combined single limit, naming the United States, DTSC, and RWQCB as additional insureds. In addition, for the duration of this Order, Respondents shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondents in furtherance of this Order. Prior to commencement of the Work under this Order, Respondents shall provide to EPA, DTSC and RWQCB certificates of such insurance and a copy of each insurance policy. Respondents shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Respondents demonstrates by evidence satisfactory to EPA, DTSC and RWQCB that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Respondents need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

XXI. FORCE MAJEURE

~~77.~~67. "Force majeure " for purposes of this Order, is defined as any event arising from causes beyond the control of the Respondents, of any entity controlled by Respondents, or of Respondents' contractors, that delays or prevents the performance of any obligation under this Order despite Respondent's best efforts to fulfill the obligation. Without limitation, a court-ordered injunction or stop work order related to any Work required by this Order is considered to be a force majeure event. In addition, Respondents's inability to perform Work required under this Order due to the Navy's failure or delay in addressing a Navy Retained Condition, or any other breach of the ETCA by the Navy, shall be considered a force majeure event. The requirement that the Respondents exercise best efforts to fulfill the obligation includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force

Majeure" does not include a failure to attain the ~~Performance Standards~~Remedial Action Objectives or financial inability to complete the Work, except to the extent that a failure by the Navy to fund all or a portion of the ETCA delays or prevents performance of obligations under this Order that are funded by the ETCA. Except as otherwise provided in this Paragraph ~~77,~~67, "Force Majeure" shall not, except as set forth above, include any delays caused by any disputes between the Navy and/or Respondents or any successors in title to the Site. Any delays caused by disagreements between or among EPA, DTSC and/or RWQCB and/or the Navy, or any other regulatory agency with jurisdiction over any matter herein, shall be considered out of Respondents' control, shall be considered a force majeure event, and Respondents shall have no obligation under this Order to mitigate the effects of such force majeure event.

~~78.~~68. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a force majeure event, the Respondents shall notify orally EPA's Project Coordinator, DTSC's Project Coordinator and RWQCB's Project Coordinator or, in his or her absence, their Alternate Project Coordinators or, in the event both of EPA's designated representatives are unavailable, the Director of the Superfund Division, EPA Region 9, within 48 hours of when Respondents first knew that the event might cause a delay. Within 14 days thereafter, Respondents shall provide in writing to EPA, DTSC and RWQCB an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Respondents's rationale for attributing such delay to a force majeure event if Respondents intend to assert such a claim; and a statement as to whether, in the opinion of the Respondents, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Respondents shall include with any notice all available documentation supporting Respondents' claim that the delay was attributable to a force majeure event. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Respondent shall be deemed to know of any circumstance of which Respondent, any entity controlled by Respondent, or Respondent's contractors knew or should have known.

~~79.~~69. If EPA, after consultation with DTSC and RWQCB, agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Order that are affected by the force majeure event will be extended by EPA, after consultation with DTSC and RWQCB, for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA, after consultation with DTSC and RWQCB, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Respondents in writing of its decision. If EPA, after consultation with DTSC and RWQCB, agrees that the delay is

attributable to a force majeure event, EPA will notify the Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

~~80.~~70. If the Respondents elect to invoke the dispute resolution procedures set forth in Section XXIII (Dispute Resolution), Respondents shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Respondents shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Respondents complied with the requirements of Paragraphs ~~77~~67 and ~~78,~~68, above. If Respondents carry this burden, the delay at issue shall be deemed not to be a violation by Respondents of the affected obligation of this Order identified to EPA.

XXII. EPA, DTSC AND RWQCB DISPUTE PROCESS

~~81.~~71. If disagreements or disputes arise during the consultation process between EPA, DTSC and RWQCB under this Order, EPA, DTSC and RWQCB agree to use the process outlined in this Paragraph to resolve such disputes. EPA, DTSC and RWQCB shall, whenever possible, make decisions by consensus at the Project Coordinator level. In the event a consensus decision cannot be reached by the EPA, DTSC and RWQCB Project Coordinators concerning the approval of a document or deliverable required by this Order, a meeting or telephone conference shall be scheduled and held within five (5) days of DTSC and/or RWQCB raising the dispute among EPA, DTSC and RWQCB Project Coordinators and their immediate supervisors to reach a consensus decision. If consensus cannot be reached by the immediate supervisors, the dispute shall be immediately elevated to the EPA Region 9 Assistant Director of the Federal Facility and Site Cleanup Branch, the DTSC Supervising Hazardous Substances Engineer II, xxxxx Office, Brownfields and Environmental Restoration Program, and the RWQCB Section Chief, Site Cleanup Section, who shall meet or confer by telephone within ten (10) days of the meeting or telephone conference discussed above in an attempt to resolve the dispute through consensus. If no consensus can be reached, the dispute shall be immediately elevated to the EPA Region 9 Director of the Superfund Division, the DTSC Deputy Director for Site Mitigation and Brownfields Reuse, and the RWQCB Executive Officer, who shall meet or confer by telephone within ten (10) days of the meeting or telephone conference discussed in the previous sentence in an attempt to resolve the dispute through consensus. If no consensus can be reached, the decision applicable to Respondents shall be the final decision made by the EPA Region 9 Director of the Superfund Division. By agreeing to this decision making process, DTSC and RWQCB do not waive any right or claim each agency may have for relief, and reserve any authority they may have under federal or state law to require Waste Material cleanups compliant with such law.

XXIII. DISPUTE RESOLUTION

[

~~82.~~72. The dispute resolution procedures of this Section shall be utilized to resolve disputes between Respondents and ~~EPA, DTSC, or RWQCB~~[Note: Since disputes about DTSC and RWQCB response costs are not covered under this paragraph, there are not any other decisions of DTSC or RWQCB that Respondent could dispute; all decisions under the Order are by EPA, after consultation with DTSC or RWQCB] arising under or with respect to this Order. Prior to the exercise of any other rights or remedies Respondents may have under applicable law to object to or challenge a decision of any other Party to this order. However, the procedures set forth in this Section shall not apply to actions by EPA to enforce obligations of the Respondents that have not been disputed in accordance with this Section. ~~Additionally, this Section shall not apply to disputes regarding DTSC's Future Response Costs or RWQCB's Future Response Costs; such disputes will be addressed in accordance with Paragraphs 72 and 73 above, respectively.~~

~~83.~~73. Any dispute which arises under or with respect to an EPA decision under this Order shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when Respondents sends the other Parties a written Notice of Dispute.

~~84.~~74. Statements of Position. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA, except on disputes regarding DTSC or RWQCB Future Response Costs reimbursement, shall be final unless within 14 days after the conclusion of the informal negotiation period, Respondents invokes the formal dispute resolution procedures of this Section by serving on EPA, with copies concurrently provided to DTSC and RWQCB, a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any position and any supporting documentation relied upon by the Respondents.

~~85.~~75. Within 21 days after receipt of Respondents's Statement of Position, EPA will serve on all other parties its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. Within 7 working days after receipt of EPA's Statement of Position, Respondents may submit a Reply. DTSC and RWQCB may also file a Statement of Position for EPA's consideration on the disputed matter no later than 7 days from receipt of EPA's Statement of Position.

~~86.~~76. Following receipt of all statements to be submitted pursuant to Paragraphs 84 and 85, the Director of the Superfund Division, EPA Region 9 will issue a final decision resolving the dispute. The Superfund Division Director's decision shall be final. The invocation of formal dispute resolution procedures under this section shall not restrict Respondents rights and remedies available under applicable law.

~~87.~~77. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Respondents under this Order, not directly in dispute, unless EPA, after consultation with DTSC and RWQCB, agrees otherwise. ~~Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 89. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Order~~. In the event that the Respondents do not prevail on the disputed issue, stipulated penalties ~~shall~~may be assessed and shall be paid as provided in Section XXIV (Stipulated Penalties)~~. If~~, except any stipulated penalties accruing during a dispute resolution period that are waived by EPA pursuant to Paragraph 83 belowIf respondents prevail on the dispute issue, the stipulated penalties shall be discharged.

XXIV. STIPULATED PENALTIES

~~88.~~78. A Respondent shall be liable for stipulated penalties in the amounts set forth in Subparagraphs ~~88.~~78.a. and b. to EPA, DTSC, and RWQCB, with 50% of such penalties to be paid to EPA and 50% to DTSC and RWQCB, for failure to comply with the requirements of this Order specified below, unless excused under Section XXI (Force Majeure). Payment of stipulated penalties to DTSC and RWQCB shall be split evenly, unless otherwise directed in the demand letter set forth in Paragraph ~~91.~~81. "Compliance" by a Respondent shall include completion of the activities required to be completed by that Respondent under this Order or any work plan or other plan approved under this Order identified below in accordance with all applicable requirements of law, this Order, the SOW, and any plans or other documents approved by EPA pursuant to this Order and within the specified time schedules established by and approved under this Order. Except with respect to an emergency or other situation described in Section ~~66~~56 above, a Respondent shall not be liable for the stipulated penalties set forth in this Section as a result of the failure of the other Respondent to comply with the Order.

a. Stipulated Penalty Amounts – Work, including Payment of Future Response Costs.

The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph (i):

Penalty Per Violation Per Day	Period of Noncompliance
$500	1st through 30th day
$1,500	30th through 45th day
$15,000	45th day and beyond

i. Compliance Milestones. The following shall constitute general categories of "compliance milestones" subject to stipulated penalties under Paragraph ~~88.~~78.a. Specific documents within

Paragraph ~~88.~~78.a (1) – (6) shall be subject to the stipulated penalties set forth above to the extent such documents have been designated "critical path" documents by Respondents in each Monthly Progress Report and subject to reasonable approval by EPA.

1) Remedial Design Document

2) Remedial Action Workplan

3) Institutional Controls Implementation Plan

4) Operations and Maintenance Plan

5) Remedial Action Completion Report

6) Work Status Report

7) Late Payment of EPA, DTSC, or RWQCB Future Response Costs

8) Failure to comply with any use restrictions selected in the RODs

9) Failure to provide access pursuant to Paragraph ~~43~~35

b. Stipulated Penalty Amounts - Reports.

The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents not within the scope of Subparagraph ~~88.~~78.a. (1) above, and any other violation of this Order:

Penalty Per Violation Per Day	Period of Noncompliance
$250	1st through 30th day
$1,000	30th through 45th day
$10,000	45th day and beyond

~~89.~~79. All penalties shall begin to accrue on the day after EPA has given Respondents written notice of noncompliance pursuant to Paragraph 80 performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XIV (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondent of any deficiency except as set forth in Paragraph ~~58~~48; (2) with respect to a decision by the Director of the Superfund Division, EPA Region 9, under Paragraph ~~86~~76 of Section XXIII (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Respondents' reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute. Nothing herein

shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

~~90.~~80. Following EPA's determination that Respondents have failed to comply with a requirement of this Order, EPA shall give Respondents written notification of the same and describe the noncompliance. After this notification and a 30 day period in which Respondents can cure the noncompliance EPA may send the Respondents a written demand for the payment of the penalties.

~~91.~~81. All penalties accruing under this Section shall be due and payable within 30 days of the Respondents' receipt from EPA of a demand for payment of the penalties, unless Respondents invokes the Dispute Resolution procedures under Section XXIII (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to U.S. Environmental Protection Agency, Attn: Region 9 Receivables, P.O. Box 37109M, Pittsburgh PA 15262-0001, shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID #0941. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA, DTSC, and RWQCB as provided in Section XXXV (Notices and Submissions). All payments to DTSC and RWQCB under this Section shall be due and payable within 30 days of the Respondents' receipt from DTSC and the RWQCB of a demand for payment of the penalties, unless Respondents invokes the Dispute Resolution procedures under Section XXIII (Dispute Resolution). All payments to DTSC under this section shall be paid by cashier's or certified check made payable to "DTSC," and shall bear on the face the Docket number of this Order. Payments shall be sent to:

Department of Toxic Substances Control
Accounting/Cashier
1001 I Street, 21st Floor
P.O. Box 806
Sacramento, California 95812-0806

All payments to RWQCB under this section shall be paid by certified or cashier's check(s) made payable to the State Water Resources Control Board Cleanup and Abatement Account and shall bear on the face the Docket number of this Order. Payment ***shall be sent to California Regional Water Quality Control Board, Central Valley Region, 11020 Sun Center Drive, #200, Rancho Cordova, CA 95670. [Note: Correct region***?]

~~92.~~82. The payment of penalties shall not alter in any way Respondents' obligation to complete the performance of the Work required under this Order.

~~93.~~83. Penalties shall continue to accrue as provided in Paragraph 89 during any dispute resolution period, ~~but~~except that such penalties shall be waived if EPA, after consultation with DTSC and RWQCB, determines that Respondent's failure to comply resulted from a good faith belief that its actions or omissions were in compliance with this Order, and Respondent's failure to comply did not result in actual or threatened harm to human health or the environment. Any such penalties not waived need not be paid until the following: If the dispute is resolved by agreement, or by a decision of EPA,

accrued penalties determined to be owing shall be paid to EPA within 30 days of the agreement or the receipt of EPA's decision or order. If Respondents prevail on the disputed issue, the stipulated penalties shall be discharged;

~~94.~~84. If Respondents fail to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph ~~90.~~80.

~~95.~~85. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondents' violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, provided, however, that EPA shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Order.

~~96.~~86. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

XXV. Covenant Not to Sue by EPA

~~97.~~87. In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this Order, and except as otherwise specifically provided in this Order, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for Existing Contamination. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the continuing and saisfactory performance by Respondents of all obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XIX. This covenant not to sue is also conditioned upon the veracity of information provided to EPA by the Respondents in this Order. This covenant not to sue extends only to Respondents and does not extend to any other person.

XXVI. RESERVATIONS OF RIGHTS BY EPA

~~98.~~88. Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondents

in the future to perform additional activities pursuant to CERCLA or any other applicable law.

~~99.~~89. The covenant not to sue set forth in Section XXV above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Order is without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

a. claims based on a failure by Respondents to meet a requirement of this Order;

b. liability based on Respondents'~~s~~ transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in a ROD, this Order, or otherwise ordered by EPA, after signature of this Order by the Respondents;

c. criminal liability;

d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments arising from negligent acts or omissions of the Respondents or their contractors;

e. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site ~~unless waste materials constitute Navy retained conditions;~~ NOTE: This implies the covenant does pertain to off-site Navy-Retained Conditions, but it doesn't – right?

f. liability for violations of federal or state law which occur during or after implementation of Removal or Remedial Actions; and

g. liability for additional response actions that EPA determines are necessary to achieve ~~Performance Standards~~Remedial Action Objectives.

XXVII. DTSC AND RWQCB COVENANT NOT TO SUE

~~100.~~90. In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this Order, and except as otherwise specifically provided in this Order, DTSC and RWQCB covenant not to sue or to take administrative action against Respondents pursuant to Section 107(a) of CERCLA, 42 U.S.C. §9607(a), or Section 7003 of RCRA, 42 U.S.C. 6973 for Existing Contamination. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the continuing and satisfactory performance by Respondents of all obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XIX. This covenant not to sue is also conditioned upon the veracity of information provided to DTSC and RWQCB by the Respondents in this Order. ***This***

covenant not to sue extends only to Respondents and does not extend to any other person.[We need to discuss the public process/time required for 7003 CNTS].

XXVIII. DTSC AND RWQCB RESERVATIONS OF RIGHTS

~~101.~~91. The covenant not to sue by DTSC and RWQCB set forth in Section XXVII does not pertain to any matters other than those expressly identified therein. DTSC and RWQCB reserve, and this Order is without prejudice to, all rights against Respondents with respect to all other matters, including but not limited to:

(a) claims based on a failure by Respondents to meet a requirement of this Order;

(b) liability for costs incurred or to be incurred by the State that are not reimbursed by Respondents pursuant to this Order, except for Navy-Retained Conditions;

(c) liability for performance of response actions other than the Work approved under the Order performed by Respondents pursuant to this Order, except for Navy-Retained Conditions;

(d) criminal liability;

(e) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

(f) liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site unless such waste material constitute Navy-Retained Conditions; and

(g) liability for violations of local, state or federal law or regulations.

BY RESPONDENTS

~~102.~~92. Respondents covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, or the State, or its contractors and employees, with respect to Existing Contamination, Future Response Costs, or this Order, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Work required by this Order; or

c. any claim arising out of the Work or arising out of the response actions for which the Future Response Costs have or will be incurred, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law.

d. ~~This paragraph is not applicable to actions against the United States Navy.~~ These covenants not to sue do not apply to any claim or cause of action Respondents may have against the United States as a result of acts or omissions for which the United States Navy is responsible, including but not limited to rights under CERCLA Section 330 of the FY 1992 National Defense Authorization Act, as amended or under the Conveyance Agreement for Hunters Point Shipoyard between the United States Navy and SFRA on _____, or under any deed to be executed by the Navy for any portion of the Site.

~~103.~~93. These covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph ~~99~~89 (b), (c), (d), and (f) - (g), but only to the extent that Respondents' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

~~104.~~94. Nothing in this Order shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d)

XXX. OTHER CLAIMS

~~105.~~95. By issuance of this Order, the United States, including EPA, the Navy and the State, including DTSC and RWQCB, assume no liability for injuries or damages to persons or Site resulting from any acts or omissions of Respondents.

~~106. No~~96. This order shall not be construed to give rise to any right to juducual review, not otherwise provided by applicable law, of any action or decision by EPA pursuant to this Order, including ~~remedy selection by EPA, shall give rise to any right to judicial review.~~ selection of further response actions by EPA and the Navy

XXXI. CONTRIBUTION

~~107.~~97. Nothing in this Agreement precludes the United States, the State, or Respondents from asserting any claims, causes of action, or demands for indemnification, contribution, or cost recovery against any person not a party to this ***Order, including any claim Respondents may have pursuant to Section*** 107(a)(4)(B). Nothing herein diminishes the right of the United States, pursuant to Sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2),(3), to pursue any such persons to obtain additional response costs or response actions and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

~~108.~~98. In the event of a suit or claim for contribution brought against Respondents, notwithstanding the provisions of Section 107(r)(1) of CERCLA, 42 U.S.C. § 9607(r)(1), with respect to Existing Contamination (including any claim based on the contention that either Respondents is not a BFPP, or has lost its status as a BFPP ~~***as a result of response actions taken in compliance with this Order or at the direction of EPA's Remedial Project Manager***~~), *NOTE: Wea re not sure who added this and are not sure why it was added)* the Parties agree that this Order shall then constitute an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Respondents would be entitled, from the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Order. The "matters addressed" in this Order are all response actions taken or to be taken and all response costs incurred or to be incurred by the United States, DTSC, RWQCB or Respondents with respect to Existing Contamination.

~~109.~~99. In the event Respondents were found, in connection with any action or claim it may assert to recover costs incurred or to be incurred with respect to Existing Contamination, not to be a BFPP, or to have lost its status as a BFPP ~~***as a result of response actions taken in compliance with this Order or at the direction of EPA's Remedial Project Manager***~~***NOTE: Ssee above*)**, the Parties agree that this Order shall then constitute an administrative settlement within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Respondents have resolved their liability for all response actions taken or to be taken and all response costs incurred or to be incurred by EPA, DTSC, RWQCB or by any other person with respect to Existing Contamination.

~~110.~~100. Respondents agree that with respect to any suit or claim brought by it for matters related to this Order they will notify EPA, DTSC, and RWQCB in writing no later than 60 days prior to the initiation of such suit or claim.

~~111.~~101. Respondents also agree that with respect to any suit or claim for contribution brought against it for matters related to this Order they will notify in writing EPA, DTSC, and RWQCB within 10 days of service of the complaint on it.

XXXII. NONCOMPLIANCE, STOP WORK AND DEFAULT DETERMINATIONS

~~112.~~102. Respondents shall perform and complete all necessary response actions at the Site **(*except for Navy-Retained ~~Conditions~~Condition or activities outside of the Environmental Servicess*)** in accordance with the SOW, CERCLA, the NCP, ARARs not otherwise waived, and relevant guidance.

~~113.~~103. Notices of Noncompliance and Stop Work. Following EPA's determination, after consultation with DTSC and RWQCB, that Respondents have failed to comply with a requirement of this Order, EPA shall give Respondents written notification of the same, with a copy to the Navy, DTSC, and RWQCB and describe the

noncompliance ("Notice of Noncompliance"). EPA shall also give Respondents written notification that Respondents should stop work on all or any portion of its response action activities at the Site until EPA determines that Respondents have remedied such noncompliance ("Notice to Stop Work"). Upon receipt of a Notice to Stop Work, Respondents shall immediately stop work on all or any portion of its response action activities at the Site as specified in such notice, and shall remedy the noncompliance. Respondents shall resume such response action activities only upon receipt of written notification from EPA, after consultation with DTSC and RWQCB, that Respondents may proceed with such activities as specified in the notification.

~~114.~~104. Finding of Default. EPA, after consultation with DTSC and RWQCB, may determine that a Default has occurred in one or more of the following situations: (i) EPA has issued to Respondents two or more Notices of Noncompliance for significant noncompliance, with or without accompanying Notices to Stop Work, pursuant to Paragraph ~~113~~103; (ii) EPA determines that either Respondent is implementing the Work in a manner that may cause endangerment to human health or the environment; (iii) EPA determines that either Respondent has effectively ceased to perform all or a portion of the Work for any reason, including lack of Navy funding through the ETCA, except for a Force Majeure event pursuant to Section XXI that results in only a temporary delay in performance; (iv) either ~~Respondents~~Respondent misappropriates or misuses funds received under the ETCA; or ***(v) Respondents ~~is~~are substantially and consistently deficient or late in ~~its~~s their performance of the Work.*** Prior to issuance of a Finding of Default, EPA shall provide Respondents in writing (with copies to the Navy, DTSC and RWQCB) with a Notice of Intent to Find Default and of the proposed basis for issuing a Finding of Default. Respondents may dispute the Notice of Intent to Find Default, in accordance with the process provided in Section XXIII (Dispute Resolution), and the Navy may participate in any such dispute resolution as provided in Section of the Amended FFA (NOTE: Should the Navy be able to initiate dispute resolution not otherwise initiated by Respondents). In the event of an EPA determination that a Default has occurred, either without Respondents having invoked the Dispute Resolution process in Section XXIII, or following the conclusion of such Dispute Resolution process, EPA will send Respondents a written Finding of Default, with copies to the Navy, DTSC, and RWQCB. The Finding of Default will provide the basis for EPA's determination and will specify whether Respondents may continue to perform the Work while the Navy prepares to resume response action activities under the Amended FFA.

~~115.~~105. Within thirty (30) days of Respondents' receipt of the Finding of Default, or such other time period specified by EPA, Respondents shall cease performance of the Work.

~~116.~~106. In the event that the Navy resumes performance of response action activities under the Amended FFA, Respondents shall fully cooperate in the orderly transfer of responsibilities for performance of the Work to the Navy

XXXIII. ACCESS TO INFORMATION

~~117.~~107. Respondents shall provide to EPA, DTSC and RWQCB upon request, copies of all documents and information within Respondents' possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondents shall also make available to EPA, DTSC and RWQCB for purposes of investigation, information gathering, or testimony, Respondents' employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

a. Business Confidential and Privileged Documents. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to EPA, DTSC and RWQCB under this Order to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, DTSC and RWQCB or if EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e) (7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents.

b. The Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondents asserts such a privilege in lieu of providing documents, Respondents shall provide EPA, DTSC and RWQCB with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information: and (6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of the Order shall be withheld on the grounds that they are privileged.

c. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XXXIV. RETENTION OF RECORDS

~~118.~~108. Until 10 years after the Respondents' receipt of EPA's notification pursuant to Paragraph ~~65.~~55.c. of Section XVII (Certification of Completion of the Work), Respondents, or their successors, shall preserve and retain all non-identical copies of the last draft or final version of any documents or records (including documents or records in electronic form) now in its possession or control or which come into its

possession or control that relate in any manner to the performance of the Work, provided, however, that Respondents (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned documents required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary. [EPA (?) NOTE: RESERVED FOR FURTHER MODIFICATIONS]

~~119.~~109. At the conclusion of this document retention period, Respondents, or its successor, shall notify EPA, DTSC and RWQCB at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA or DTSC, Respondents shall deliver any such records or documents to EPA, DTSC and RWQCB. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege, Respondents shall provide EPA, DTSC and RWQCB with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of the Order shall be withheld on the grounds that they are privileged.

XXXV. NOTICES AND SUBMISSIONS

~~120.~~110. Whenever under the terms of this Order, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Order with respect to EPA, DTSC, RWQCB and the Respondents, respectively.

As to the EPA:

Keith Takata
Director, Superfund Division
United States Environmental Protection Agency
Region 9
75 Hawthorne St.
San Francisco, CA 94105

and

EPA Project Coordinator, SFD-8-1
United States Environmental Protection Agency
Region 9
75 Hawthorne St.
San Francisco, CA 94105

As to the Regional Financial Management Officer:

Chief, Cost Accounting
United States Environmental Protection Agency
Region 9
75 Hawthorne St.
San Francisco, CA 94105

As to the California Department of Toxic Substances Control:

Anthony J. Landis, P.E.
Chief
Northern California Operations
Office of Military Facilities
Department of Toxic Substance Control
8800 Cal Center Drive
Sacramento, CA 95826

and

Project Manager
Brownfields and Environmental Restoration Program
Department of Toxic Substances Control

As to the San Francisco Bay Regional Water Quality Control Board:

Executive Officer
California Regional Water Quality Control Board,
San Francisco Bay Region

and

Project Manager
California Regional Water Quality Control Board,
San Francisco Bay Region

As to the Respondents:

XXXVI. APPENDICES

~~121.~~111. The following appendices are attached to and incorporated into this Order:

A. Legal description of the Site

B. Map of the Site

C. Statement of Work

D. ~~RI Areas~~IR Sites (?)

E. Land and Water Use Restrictions (NOTE: What is intended by the – the LUCs? The RMPs?]

XXXVII. COMMUNITY RELATIONS

~~122.~~112. Respondents shall prepare and submit for review and approval by EPA, in consultation with DTSC and RWQCB, a Community Relations Plan, as defined in the SOW. EPA, after consultation with DTSC and RWQCB, will determine the appropriate role for the Respondents under the Plan. Respondents shall also cooperate with EPA, DTSC, and RWQCB in providing information regarding the Work under this Order to the public. As requested by EPA, Respondents shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site or the Work being conducted under this Order.

XXXVIII. MODIFICATIONS

~~123.~~113. EPA, after consultation with DTSC and RWQCB, may determine that in addition to tasks defined in the SOW, or initial approved work plans, other additional work may be necessary to accomplish the ~~Performance Standards~~Remedial Action Objectives . To the extent that such additional work is within the scope of the the RODs and does not otherwise constitute an amendment, modification or supplement to the RODs, EPA, after consultation with DTSC and RWQCB, may request in writing that Respondents perform these response actions and Respondents shall confirm its willingness to perform the additional work, in writing, to EPA, DTSC, and RWQCB within 14 days of receipt of EPA's request, or Respondents may invoke dispute resolution in accordance with Section XXIII. Subject to EPA resolution of any dispute, Respondents shall implement the additional tasks which EPA, after consultation with

DTSC and RWQCB, determines are necessary. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

~~124.~~114. If Respondents seeks permission to deviate from any approved work plan or schedule or the SOW except as otherwise provided for by field modifications to Remedial Action Work Plan, Respondents's Project Coordinator shall submit a written request to EPA, DTSC and RWQCB for approval outlining the proposed modification and its basis. Respondents may not proceed with the requested deviation until receiving written approval from the EPA Project Coordinator, after consultation with the DTSC Project Coordinator and the RWQCB Project Coordinator.

~~125.~~115. No informal advice, guidance, suggestion, or comment by the EPA, DTSC, or RWQCB Project Coordinator or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of its obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it is formally modified in accordance with this Section.

~~126.~~116. This Order shall be made available for a period of not less than thirty (30) days for public notice and comment. The United States, DTSC and RWQCB reserve the right to withdraw or withhold their consent if the comments regarding the Order disclose facts or considerations which indicate that the Order is inappropriate, improper, or inadequate.

XXXIX. TERMINATION

~~127.~~117. This Order shall terminate under one or more of the following circumstances:

a. Upon a Finding of Default by EPA, in consultation with DTSC and RWQCB, under Paragraph 114;

b. Upon EPA's Certification of Completion of the Work, pursuant to Paragraph ~~65~~55; or

c. Upon termination of the ETCA, this Order shall terminate with respect to any ~~***Remedial Action***~~ROD Implementation Area for which EPA has not yet issued a Certification of Completion of Remedial Action. Upon termination of the ETCA, this Order shall remain effective with respect to any ~~***Remedial Action***~~Rod Implementation Area and Work for which EPA has already issued the Certification of Completion of Remedial Action. NOTE: We don't remember who added this, or why it was added. We need to discuss.

XXXX. EFFECTIVE DATE

~~128.~~118. This Order shall be effective when EPA issues written notice to Respondents that each of the following conditions have been met: a.) the expiration of the

public notice and comment period for this Order and EPA's determination that comments received, if any, do not require EPA to modify or withdraw from this Order; b.) the completion of the public comment process on the FOSET; c.) the execution of the ETCA and the Amended FFA; and d.) EPA's approval of and the Governor of the State of California's concurrence with the Covenant Deferral Request.

ADMINISTRATIVE ORDER ON CONSENT
FOR RI/FS AND RD/RA FOR CLEANUP
OF PORTIONS OF THE FORMER HPNS

For Respondents:

Agreed this ___ day of _____, 2_____.

ADMINISTRATIVE ORDER ON CONSENT
FOR RI/FS AND RD/RA FOR CLEANUP
OF PORTIONS OF THE FORMER HPNS

For EPA:

Agreed this ___ day of _____, 2_____.

_____
Michael Montgomery
Assistant Director of Federal Facilities and Site Cleanup Branch
U.S. Environmental Protection Agency
Region IX
75 Hawthorne St.
San Francisco, CA 94105

_____
Date

_____
Robert G Carr
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region IX
75 Hawthorne St.
San Francisco, CA 94105

ADMINISTRATIVE ORDER ON CONSENT
FOR RI/FS AND RD/RA FOR CLEANUP
OF PORTIONS OF THE FORMER HPNS

For the United States:

Agreed this ___ day of _____, 2_____.

_____
Assistant Attorney General
Environment and Natural Resources Section
U.S. Department of Justice

Washington, D.C. 20530

ADMINISTRATIVE ORDER ON CONSENT
FOR RI/FS AND RD/RA FOR CLEANUP
OF PORTIONS OF THE FORMER HPNS

For DTSC:

Agreed this ___ day of _____, 2_____.

_____

ADMINISTRATIVE ORDER ON CONSENT
FOR RI/FS AND RD/RA FOR CLEANUP
OF PORTIONS OF THE FORMER HPNS

For RWQCB:

Agreed this ___ day of _____, 2_____.

_____

Document comparison done by DeltaView on Wednesday, June 09, 2010 12:27:41 PM

Input:	
Document 1	c:\NetDocs\Official AOC JFJ(2).doc
Document 2	c:\NetDocs\Official AOC JFJ(1).doc
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Padding cell	

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Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	574

~~SFRA Draft HPNS ETCA, 29 Jan 2010~~Collective SFRA Changes to Navy March 10 Doc

Sent for Navy Meeting

EARLY TRANSFER COOPERATIVE AGREEMENT

COVERING PORTIONS OF
HUNTERS POINT NAVAL SHIPYARD

BETWEEN

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE NAVY

AND

THE SAN FRANCISCO REDEVELOPMENT AGENCY,
SAN FRANCISCO, CALIFORNIA

EARLY TRANSFER COOPERATIVE AGREEMENT

HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

COVERING PORTIONS OF HUNTERS POINT NAVAL SHIPYARD BETWEEN THE UNITED STATES OF AMERICA DEPARTMENT OF THE NAVY AND THE SAN FRANCISCO REDEVELOPMENT AGENCY, SAN FRANCISCO, CALIFORNIA

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HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

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Appendix 13	*Agreement to Implement the Conveyance Agreement between the United States of America and the San Francisco Redevelopment Agency for the conveyance of Hunters Point Naval Shipyard with Regard to IR Sites 7/18 and the Radiologically-impacted Area around Building 140* dated _____. *Delete App 13.* ~~*Escrow*~~*Legally enforceable agreement and escrow instructions to insure that Agency has obligation to accept title when conditions for transfer are met. These conditions include RACR, FOST acceptable to DTSC, EPA, and RWQB~~*, CDPH license waiver*. *Draft of escrow instructions to be provided. FFA provisions with respect to IR 7/18 need to be drafted. Will IR 7/18 be excluded from the AOC terms? If so, what if any requirements will be imposed by EPA with respect to this parcel?*

EARLY TRANSFER COOPERATIVE AGREEMENT COVERING PORTIONS OF HUNTERS POINT NAVAL SHIPYARD BETWEEN THE UNITED STATES OF AMERICA DEPARTMENT OF THE NAVY A N D THE SAN FRANCISCO REDEVELOPMENT AGENCY, SAN FRANCISCO, CALIFORNIA

THIS EARLY TRANSFER COOPERATIVE AGREEMENT ("Agreement") is made by and between the **UNITED STATES OF AMERICA,** acting by and through Naval Facilities Engineering Command ("Navy") and the **SAN FRANCISCO REDEVELOPMENT AGENCY,** San Francisco, California ("SFRA") recognized as the local redevelopment authority by the Office of Economic Adjustment ("OEA") on behalf of the Secretary of Defense and also a local public authority legally empowered to enter into this Agreement. Hereinafter, the Navy and the SFRA are each sometimes referred to individually as a "Party" and collectively as the "Parties."

GENERAL PROVISIONS

The Federal Government, for and on behalf of the citizens of the United States of America, acts as the steward of certain real property on which it operates and maintains military facilities necessary for the defense of the United States of America. Certain military facilities are no longer required for that mission, and, in accordance with various base closure statutory authorities, the Department of Defense ("DOD") closed and plans to dispose of real and personal property at those facilities. The Navy is authorized to dispose of real and personal property on Hunters Point Naval Shipyard ("HPNS"), to the City of San Francisco or to a local reuse organization approved by the City, in accordance with Section 2824 (a) of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510), as amended by Section 2834 of the National Defense Authorization Action Act for Fiscal Year 1994 (Public Law 103-160). The SFRA is a local reuse organization approved by the City of San Francisco to accept conveyance of HPNS property in accordance with the authorities set out above.

The Parties did execute and enter into that certain *Conveyance Agreement Between the United States of America, Acting by and through the Secretary of the Navy, and the San Francisco Redevelopment Agency for the Conveyance of Hunters Point Naval Shipyard,* dated March 31, 2004 ("Conveyance Agreement").

Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. Section 9620(h)(3)(C), Federal property may be transferred prior to the

completion of all remedial action necessary to protect human health and the environment. Under this early transfer authority, the Navy intends to convey title to, among other property, the portion of HPNS property known as the Area Covered by Environmental Services (hereinafter "ACES"), to the SFRA. The ACES is defined in Section 222 below and shown in Appendix 2. The SFRA assumes responsibility for certain environmental response activities (hereinafter the "Environmental Services," as defined in Section 211 below) for the consideration set forth in this Agreement. The principal purpose of this Agreement is to facilitate early transfer and redevelopment by providing the contractual vehicle under which the SFRA will perform the Environmental Services in the ACES and be compensated for such performance.

It is in the public interest and will be beneficial to the Navy and the SFRA for the SFRA to cause to be performed the Environmental Services at the ACES. As set forth in the Amended Federal Facilities Agreement ("Amended FFA"), as defined in Section 231 below, the Navy will resume CERCLA responsibility for compliance with the Amended FFA in the event of a Finding of Default as provided in the Administrative Order on Consent ("AOC") as hereinafter defined, or upon a failure of the Navy to continue its funding obligations, as described in Article IV, or upon a termination of this Agreement pursuant to Sections 701 and 1003 below. Notwithstanding any other provisions of this Agreement, the Navy is not a party to, bound by, or responsible for compliance with any of the provisions of the AOC. The Navy's obligations pursuant to the Amended FFA are not affected by this Agreement with respect to Navy Retained Conditions, as defined in Section 206.

This Agreement benefits the Navy and the SFRA because it facilitates early transfer and immediate reuse by allowing the SFRA to cause to be performed certain environmental remediation activities and simultaneously facilitates redevelopment as defined herein. This Agreement, executed as part of an early transfer, facilitates SFRA access and control to the ACES in conjunction with implementation of the SFRA's Reuse Plan (as defined in Section 220 below). In addition, early transfer will allow the Navy to convey title in compliance with CERCLA requirements at an earlier date than could otherwise be achieved. This Agreement is a Cooperative Agreement within the meaning of 31 U.S.C. Section 6305 and 10 U.S.C. Section 2701(d)(1).

In accordance with 42 U.S.C. 9620 (h)(3)(C)(iii), after all ~~remedial~~response action necessary to protect human health and the environment with respect to any hazardous substances remaining on the ACES on the date of transfer has been taken, the Navy will deliver to the SFRA an appropriate document containing the CERCLA warranty that "all response action necessary to protect human health and the environment with respect to any substance remaining on the property on the date of transfer has been taken~~-~~..."

The Navy and the SFRA have entered into this Agreement for the purpose of establishing the terms and conditions necessary to obtain Regulatory Closure for the ACES and ensure the execution of Long-Term Obligations associated with Regulatory Closure. The Navy

agrees to provide funds to the SFRA in accordance with and subject to the provisions of this Agreement and to undertake and complete its obligations under Section 302 hereof. The SFRA agrees to perform the Environmental Services in accordance with and subject to the provisions of this Agreement.

Article I
SCOPE AND PURPOSE

Section 101. ~~Performance of Environmental Services~~Scope of Agreement

The SFRA ~~shall cause to be performed~~agrees to assume the Navy's responsibility to perform the Environmental Services in accordance with and subject to the provisions of this Agreement subject to the receipt of funding from the Navy ~~in the amount of _____~~. ~~The Environmental Services, to the extent required to be performed under this Agreement, with regard to the ACES, shall achieve Regulatory Closure and comply with Long Term Obligations for Known Conditions and Insured Unknown Conditions throughout the ACES as provided herein shall satisfy the requirements of CERCLA including but not limited to as provided for in the CERCLA Record of Decisions ("ROD") (as defined in Section 207) (including Explanation(s) of Significant Differences and ROD amendments), the National Contingency Plan ("NCP"), and the AOC (as hereinafter defined), *but excluding those RODS, ESDs and amendments which, pursuant to section 206, are determined to be Navy Retained obligations.* The SFRA shall not be responsible for any Navy Retained Conditions subject to the provisions of this Agreement. [Note: this assumes that all PCAP work will be completed prior to transfer]~~pursuant to Section 302(a), and Articles IV, V and VI The SFRA does not assume by this Agreement any obligation or liability not expressly identified as such by the SFRA in this Agreement.

Section 102. Performance Method

~~The~~This Agreement, the CERCLA RODs ~~(including Explanation(s) of Significant Differences and ROD amendments)~~and associated Remedial Design reports, and AOC together establish the process for the SFRA ~~obtaining Regulatory Closure within the ACES.~~'s performance of the Environmental Services. By the execution of this Agreement, the Navy concurs with the Regulatory Closure process set forth in this Agreement ~~and the CERCLA RODs (including Explanation(s) of Significant Differences and ROD amendments), and all documents and approvals referenced therein with respect to performance of Environmental Services~~, the CERCLA RODs and associated Remedial Design reports, and the AOC.

Article II
DEFINITIONS

Section 201. Agreement

The term "Agreement" means this Early Transfer Cooperative Agreement.

Section 202. Navy's Representative

The term Navy's representative ~~for execution purposes is~~means the Naval Facilities Engineering Command, which is responsible to the office of the Secretary of the Navy for environmental remediation within the ACES, or its successor.

Section 203. SFRA

The term "SFRA" means the San Francisco Redevelopment Agency, a Redevelopment Authority of the State of California, recognized as the local redevelopment authority for the HPNS by the OEA on behalf of the Secretary of Defense. The SFRA is an entity that is within the meaning of the term "local government agency" as such term is used in 10 USC Section 2701(d)(1), with which the Navy is entitled to enter into "agreements on a reimbursable or other basis."

Section 204. Hunters Point Naval Shipyard

The term "Hunters Point Naval Shipyard" or "HPNS" means that portion of the real property at the former Hunters Point Naval Shipyard, shown on the map attached as Appendix 1 and incorporated herein by reference.

Section 205. Administrative Order on Consent ("AOC").

The term "Administrative Order on Consent" or "AOC" means that certain signed agreement executed between the SFRA, ~~[Lennar entity]~~HPS Development Co., LP, and the Environmental Regulatory Agencies dated XX- XX-XXXX.

Section 206. Navy-Retained Conditions

The ~~following~~term "Navy-Retained Conditions" ~~are not within the scope of the Environmental Services covered by this Agreement and the SFRA is not responsible for conducting, investigating or remediating them under this Agreement~~means: (i) Unexploded Ordnance; Military Munitions; chemical, radiological or biological warfare agents; and Radiological Materials; (ii) the performance of CERCLA five-year reviews for years 2013 and 2018 for remedies selected in CERCLA RODs issued by the Navy; (iii) any ~~other~~ activity identified as the responsibility of the Navy in the Amended FFA~~, and (iv) any change to requirements associated with Unexploded Ordnance; Military Munitions; chemical, radiological or biological warfare agents; and Radiological Materials in the CERCLA RODs set forth in an Explanation of Significant Differences under CERCLA or a ROD amendment; *(v) unknown uninsured conditions.* Navy Retained Conditions do~~; and (iv) Uninsured Conditions. The term Navy-Retained Conditions does not include Ineligible Work as defined in Section 218 below. ~~*Environmental Services do not include costs or work required by Regulatory Agencies due to any*~~

~~*change to a CERCLA ROD or set forth in an Explanation of Significant Differences under CERCLA or a ROD Amendment except:*~~

~~*a. to the extent covered by insurance, or*~~

~~*b. not attributable to the negligence or misconduct of SFRA*~~

~~*In the event of such change, the Parties agree to meet, determine whether the costs or work are Navy Retained pursuant to the criteria above and if they are, to identify the Navy's funding source and schedule and to consider the addition of and payment for such work to the ETCA or to arrange for some other contractual relationship.*~~

~~*In the performance of Navy Retained conditions, the Navy agrees to minimize the interference with SFRA's performance of Environmental Services and development work to the extent practicable and consistent with the protection of human health and the environment.*~~

Section 207. CERCLA RODs

The term "CERCLA RODs" means the CERCLA Record of Decision for Parcel B dated January 14, 2009, and the CERCLA Record of Decision for Parcel G dated February 18, ~~2009, *[EPA and Navy are to resolve "who is United States."]* amendments thereto, and explanation of significant differences thereto.~~2009.

Section 208. Regulatory Closure

~~The Term "Regulatory Closure" means approval or certification of completion of any necessary remedial or corrective action required to address Known Conditions and Insured Unknown Conditions throughout the ACES including but not limited to that required by the CERCLA RODs (including Explanation(s) of Significant Differences and ROD amendments), and the AOC, or the issuance of a "No Further Action" letter or equivalent finding by the appropriate Environmental Regulatory Agency or Agencies pursuant to the statutes and regulations administered by those Agencies with respect to the ACES and undertaken by the SFRA pursuant to this Agreement. The term "Regulatory Closure" shall include without limitation Certifications of Completion issued by EPA as set forth in Article XVII of the AOC.~~

The Term "Regulatory Closure" as applied to the entire ACES, means issuance of a Certification of Completion of Remedial Action or of an Interim certification of Completion of Remedial Action for areas encompassing each Cost Gap Insured condition and Additional Insured Condition within the ACES. As applied to a portion of the ACES or to a particular Pollution Condition, the term means the issuance of a Certification of Completion of Remedial Action or of an Interim Certification of Completion of Remedial Action for that an area encompassing that portion of the ACES or that Pollution Condition..

Section 209. Navy and Government

The terms "Navy" and "Government" are used interchangeably herein.

Section 210. Long-Term Obligations

The term "Long-Term Obligations" means any long-term review, monitoring, reporting and institutional control ("IC") and operation and maintenance requirements that are required ~~in support of and after Regulatory Closure to address any necessary remedial or corrective action required to address Known~~to be performed after a RACR has been approved pursuant to the AOC to address cost Cap Insured Conditions and ~~Insured Unknown~~Additonal Insured Conditions throughout the ACES~~ including but not limited to that associated with or in furtherance of the CERCLA RODs (including Explanation(s) of Significant Differences and ROD amendments), and AOC, including providing existing records and reports for the Navy's preparation of the CERCLA five year reviews for years 2013 and 2018 and SFRA preparation of the CERCLA five year reviews thereafter~~.

Section 211. Environmental Services

The term "Environmental Services" means activities funded by this ~~agreement~~Agreement solely with respect and limited to the Cost Cap Insured ~~Scope of Work~~Conditions and Additional Insured Conditions necessary to obtain Regulatory Closure throughout the ACES, and associated Long-Term Obligations ~~upon which such Regulatory Closure is conditioned~~ except to the extent that such ~~*Longterm*~~Long-Term Obligations are attributable to Navy Retained ~~*Obligations*~~Conditions. The term "Environmental Services" does not include the performance of Navy-Retained Conditions~~ as defined in Section 206 or Ineligible Work as defined in Section 218 below~~.; Ineligible Work;, any work associated with implementing amendments of, or Explanations of Significant Differences (ESDs) with, the CERCLA RODs; any work associated with the migration of a Pollution Condition from outside the ACES onto, into, or under the ACES; or any work associated with the migration of a Pollution Condition from the ACES onto, into or under Parcel F, except to the extent such migration is caused or contributed to by the negligence of SFRA or any party acting on its behalf. .

Section 212. ~~Insured Scope of Work~~**Cost Cap** Insured Conditions

The term "Cost Cap Insured ~~Scope of Work" means work necessary to address environmental conditions that is~~Conditions" means Pollution Conditionsthat are within the coverage grant and not excluded of the cost overrun insurance component of the Environmental Insurance Policies, and includes such ~~work~~Pollution Conditions even after the expiration of the term of, or exhaustion of the limits of, the cost overrun insurance component of the Environmental Insurance Policies, except to the ~~extend~~extent such ~~Work~~Pollution Condition is a Navy-Retained Condition. [Note: If Navy retained, it would not be in the coverage grant]

Section 213. ~~Insured Conditions~~**Additional** Insured Conditions

The term "Additional Insured Conditions" means those ~~environmental conditions~~Pollution Conditions in the ACES that are not ~~within the insured scope of work~~Cost Cap Insured Conditions but are otherwise within the coverage grant and not excluded of the Environmental Insurance Policies. This term also includes any ~~environmental~~

~~condition~~Pollution Condition that otherwise would have been an Additional Insured Condition but for which coverage was denied by the insurance provider solely due to the failure of the SFRA or named insured to comply with any requirements as set forth in the Environmental Insurance Policies ~~("Excluded Insured Condition"). The term "Insured Conditions" shall include Excluded Insured Conditions~~, but only to the extent of specific costs that would have otherwise been funded by the Environmental Insurance Policies but for such failure of the SFRA or the named insured.

Section 214. Uninsured Condition(s).

The term "Uninsured Condition(s)" means those ~~environmental conditions~~Pollution Conditions that are not ~~"~~Cost Cap Insured Conditions or "Additional Insured Conditions".

Section 215. Radiological Materials *[Need to discuss further]*

The term "Radiological Materials" means solid, liquid, or gaseous material derived from U.S. Government activities, that contains radionuclides regulated by the Atomic Energy Act of 1954, as amended, and those materials containing radionuclides ~~defined as being derived from the Navy's work on~~, including the following: nuclear propulsion plants for ships and submarines; nuclear devices and nuclear components thereof, and; radiographic and instrument calibration sources and various instrumentation and radioluminescent products manufactured for military applications. The term "Radiological Materials" does not include products commonly used in non-military applications such as radioluminescent signs~~, tungsten welding electrodes~~ and household smoke detector components~~ *except to the extent that such products were used for military repair or maintenance activities or are located within the ACEs as a result of Operation Crossroads.* [Need to discuss procedures in event Radiological Materials are encountered unexpectedly.]~~. that do not require special handling or treatment as a result of the materials containing radionuclides, or are otherwise subject to regulatory standards that would be applied in the absence of such radiological materials.

Section 216. Environmental Insurance Policies

The term "Environmental Insurance Policies" means the environmental insurance ~~policy(ies) issued and approved pursuant to Section XXXXX and meeting the requirements of Section XXXXX below and attached as Appendix 4.~~which the SFRA shall procure in accordance with Section 712.e of this Agreement.

~~**Section 217.** Reserved~~

Section 217. Pollution Condition means . . . *[Insert the exact definition from the Environmental Insurance Policies]*

Section 218. Ineligible Work

The term "Ineligible Work" means the performance of any one or more of the following work:

a. Cleanup of: (1) lead based paint ("LBP") and asbestos containing materials ("ACM") incorporated into building materials in their original location and not previously demolished by the Navy or its contractors or (2) lead in soil resulting from natural weathering of LBP from buildings and structures.

b. Cleanup of pesticides and herbicides applied in accordance with the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and its predecessors including, but not limited to, chlordane properly applied as a termiticide to presently existing wooden structures, their foundations, and underlying soils. ~~*[note EPA comment on draft FOSL: consumer product exemption does not apply. Further, 40 CFR 302.4 specifically lists chlordane and other termiticides as a CERCLA hazardous substance, pursuant to 42 USC 9602. What is the basis for excluding remedial work for a specifically designated hazardous substance? Further, if soils containing pesticides were moved by the Navy from the location where the pesticides were applied, what is the basis for rendering the cost for cleanup of such soil ineligible? What is basis upon which proper application is to be determined?]*~~

~~c. Management and off site disposal of contaminated soil or solid waste excavated or generated during the course of Redevelopment Activity within any portion of the ACES for which all appropriate Environmental Regulatory Agencies have previously approved Regulatory Closure following: (1) the installation of a cap/cover remedial action by the SFRA, or (2) issuance of an approved Remedial Action Completion Report ("RACR") following installation of a cap/cover remedial action by the Navy.~~

c. ~~d.~~ Additional remediation necessary to implement a change in land use from the land uses set forth in the 1997 Reuse Plan.

~~e.~~ Management and disposal of construction and demolition debris, except to the extent such debris is generated in the course of ~~Redevelopment Activity~~an activity required by the AOC, such as the demolition of hardscape necessary to install a monitoring well.

d. ~~f.~~ Clean up of contaminants within existing buildings and structures, that have not been released into the environment; except ~~the following shall not be Ineligible Costs~~for removal of liquids, solids, gases, sediments, and/or sludges from and including oil/water separators and other equipment and containment vessels within or beneath structures to the extent the equipment and vessels were not reasonably discovered by visual inspection during a pre-conveyance walk-through in which both parties participated.

e. ~~g. Any reconstruction, alteration, or replacement of any initial cap/cover containment remedial action constructed pursuant to a ROD (including but not limited to reconstructed, altered, or replaced cap/covers incorporating soil vapor barriers for enclosed~~

~~structures), but only to the extent that such reconstruction, alteration or replacement is the result of (i) SFRA's failure to implement and/or enforce required institutional controls, or (ii) Redevelopment Activity.~~Any activity associated with disturbing or altering a cover, cap or other component of an environmental remedy installed pursuant to the AOC, except to the extent such disturbance or alteration is necessary to comply with the AOC as a result of actual or potential remedy failure, or as a result of addressing Pollution Conditions other than those addressed by the cover, cap or other environmental remedy.

f. ~~h.~~ Non-cleanup environmental compliance activities relating to redevelopment/construction following conveyance (e.g., compliance with air quality permit requirements for control of fugitive dust emissions that are not contaminated with hazardous substances or petroleum and the National Pollutant Discharge Elimination System ("NPDES") stormwater discharge permit requirements regulating excavation/disturbance of soil that is not contaminated with hazardous substances or petroleum).

i. Any other work or activity that is not related to: (1) achieving "Regulatory Closure" for releases of hazardous substances or petroleum within the ACES, or (2) performing associated "Long-term Obligations."

j. All Regulatory Enforcement Activities ~~unrelated to regulatory oversight~~.

k. Cleanup that is required as a result of a violation of: (i) use restrictions by the SFRA, its successors and assigns, or (ii) any land use restriction, groundwater restriction, deed covenant or IC applicable to the ACES.

1. Cleanup arising from the failure of the SFRA, its successors and assigns, to operate or maintain a remedy as required by the PCAP or USEPA through the CERCLA RODs ~~(including Explanation(s) of Significant Differences and ROD amendments)~~, AOC, Land Use Control Remedial Design Reports ("LUC RD"), Risk Management Plan ("RMP") and/or Operation and Maintenance Plan ("OMP").

~~SFRA shall have no obligation to address activities defined as Ineligible Work, except to the extent work is funded by the Navy or the Environmental Insurance Policies.~~

~~m. Except to the extent any portion of Ineligible Work is a Navy Retained Condition, the Navy shall have no responsibility for Ineligible Work, and no funds provided under Section 302(a) may be used by the SFRA to fund Ineligible Work; provided, however, that nothing in this Agreement shall prohibit the SFRA, within its sole discretion, from performing Ineligible Work at the SFRA's own cost and expense. NOTE TO NAVY: This should be moved out of definitions to an operative section.~~

Section 219. ~~Redevelopment Activity~~ Parcel F

~~The term Redevelopment Activity means activities undertaken which are not pursuant to a CERCLA ROD remedy.~~

Parcel F shall mean the submerged area more particularly described in Exhibit _____.

Section 220. Reuse Plan

The term "Reuse Plan" means that certain Redevelopment Plan for the HPNS, approved by the Mayor and Board of Supervisors for the City of San Francisco in July of 1997, as such Redevelopment Plan has been amended as of the date of the execution of this Agreement by the following documents: (i) XXXX and (ii) XXXX, all in accordance with the California Community Redevelopment Law (Health and Safety Code Section 33000, et seq.).

Section 222. Area Covered by Environmental Services

The term "Area Covered by Environmental Services" or "ACES" means that area identified on the map in Appendix 2. , and specifically excludes IR Sites 7/18 and the radiologically-impacted area.

Section 223. Unexploded Ordnance/Munitions or Explosives of Concern

The term "Unexploded Ordnance" or "UXO" means Military Munitions that have been fired, dropped, launched, projected, or otherwise placed, abandoned or disposed of in such manner as to constitute a hazard to military or non-military operations, installations, personnel, or material and remain unexploded either by malfunction, design, or any other cause.

Section 224. Military Munitions

The term "Military Munitions" means all ammunition products and components produced or used by or for DOD or the United States Armed Services for national defense and security, including military munitions under the control of DOD, the United States Coast Guard, the United States Department of Energy ("DOE") and National Guard personnel. The term "Military Munitions" includes but is not limited to confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DOD components, including bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, demolition charges, and devices and components thereof. The term "Military Munitions" does not include wholly inert items and non-standard explosive devices made from either military or non-military materials by personnel unrelated to DOD. However, the term "Military Munitions" does include non-nuclear components of nuclear devices managed under DOE's nuclear weapons program after all required sanitization operations under the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§2011 et seq., have

been completed.

~~**Section 225.** Navy Obligations~~
Technical Specifications and Requirement Statement or TSRS.

The term "Technical Specifications and Requirement Statement or "TSRS" means the statement of work included in Appendix ____.

~~The term "Navy Obligations" means the obligations of the Navy as set forth in Section 302 hereof.~~

Section 226. Regulatory Oversight ~~*[EPA and Navy were to address and discuss]*~~

~~*a.*~~ The term "Regulatory Oversight" includes the following services provided by ~~any Environmental Regulatory Agency~~the United States Environmental Protection Agency, the California Department of Toxic Substances Control ("DTSC"), and the San Francisco Bay Water Quality Control board ("Water Board") which are considered allowable costs under this Agreement. ~~Technical review of documents or data;~~

a. Technical review of documents or data;

b. Identification and explanation of state applicable or relevant and appropriate requirements (ARARs);

c. Site visits other than enforcement inspections;

d. Technical Review Committee (TRC) or appropriate community outreach program if applicable;

~~e. Administration of the Cooperative Agreement, technical review and comment on all documents and data regarding DoD prioritization of sites;~~

e. ~~f.~~ Determination of scope and applicability of agreements [elaborate], excluding any litigation costs against the U.S. Government;

f. ~~g.~~ Independent quality assurance/quality control samples not to exceed ten percent of the samples collected.

Section 227. Regulatory Enforcement Activities

In accordance with 10 U.S.C. 2701(d)(3), regulatory enforcement costs are not allowable costs under this Agreement. The term "Regulatory Enforcement Activities"

includes:

a. Activities associated with the City of San Francisco taking, or preparing to take, enforcement actions against third parties for alleged violations of laws, regulations, or enforceable agreements associated with environmental protection, public health or safety or alleged violations of land use restrictions set forth in quitclaim deed(s) or in a Covenant to Restrict the Use of Property ("CRUP"), as hereinafter defined, on the ACES; or

b. Activities associated with USEPA, DTSC, the Water Board, CDPH, or other independent State or Federal regulatory agency with jurisdiction over the ACES taking, or preparing to take, enforcement actions against the SFRA, or its contractors or agents, for alleged violations of laws, regulations, or enforceable agreements associated with environmental protection, public health or safety.

Section 228. Grants Officer

The ~~Navy's~~term Grants Officer ~~is~~means the Director of Acquisition, NAVFACENGCOM~~, and is the only authorized Government official who can make changes and obligate funds under this Agreement~~.

Section 229. Environmental Regulatory Agency or Agencies

The term "Environmental Regulatory Agency or Agencies" means the United States Environmental Protection Agency ("USEPA"), the California Department of Toxic Substances Control ("DTSC"), and the San Francisco Bay Water Quality Control Board ("Water Board")~~, and the California Department of Public Health ("CDPH"), or other independent state or federal agency with jurisdiction over the Environmental Services~~.

Section 230. Covenant to Restrict the Use of Property

The term "Covenant to Restrict the Use of Property" or "CRUP" means that certain document required by the CERCLA RODs that identifies the environmental covenants and restrictions that shall apply to the ACES. ~~These environmental covenants and restrictions are necessary for the protection of human health and the environment and the implementation of final remedies for the ACES.~~

Section 231. Amended Federal Facilities Agreement

The term "Amended Federal Facilities Agreement" or "Amended FFA" means that certain document executed by the Navy, USEPA, DTSC, and the Water Board dated _____, whereby the parties to the original Federal Facilities Agreement for the HPNS dated January 22, 1992 ("FFA"), amended such FFA.

Section 232. Petroleum Corrective Action Plans *[Delete this section if all PCAP work is completed prior to transfer]*

The term "Petroleum Corrective Action Plans" or "PCAPs" means the Petroleum Corrective Action Plan entered into among SFRA, the Water Board and DTSC effective concurrent with the Effective Date and addressing petroleum releases associated with the ACES that are not otherwise addressed within the CERCLA RODs.

Section 233. Remedial Action Closeout Report or RACR

The term "Remedial Action Closeout Report or RACR" means *[INSERT exact definition from AOC (to be written).*

A r t i c l e I I I
OBLIGATIONS OF THE PARTIES

Section 301. Obligations of the SFRA

In consideration of the Navy's agreement to pay the SFRA for allowable costs in the amount specified in Section 302 below, the terms of this Agreement, the provisions of Title 32 of the Code of Federal Regulations ("CFRs"), and the applicable Office of Management and Budget ("OMB") Circulars, the SFRA assumes responsibility for performing the Environmental Services. The Environmental Services shall be conducted in a manner generally consistent with the TSRS, except to the extent SFRA reasonably determines it is necessary to vary from the TSRS in order to comply with the CERCLA RODS or a directive issued by an Environmental Regulatory Agency. [Note: Need to see form and content of TSRS]

a. ~~In consideration of the Navy's agreement to pay the SFRA for allowable costs in the amount specified in Section 302 below, the terms of this Agreement, the provisions of Title 32 of the Code of Federal Regulations ("CFRs"), and the applicable Office of Management and Budget ("OMB") Circulars, the SFRA assumes responsibility for performing the Environmental Services. Subject to the provisions of Sections 302 hereof, the SFRA agrees that it shall cause to be performed the necessary Environmental Services unless the costs associated therewith exceed the funds provided by the Navy and the environmental insurance policies hereunder. In the event that an Environmental Regulatory Agency requires changes to the Environmental Services necessary to satisfy the CERCLA RODs (including Explanation(s) of Significant Differences and ROD amendments), and AOC, the SFRA shall conduct and bear the cost of such services *except to the extent that the costs and work associated with such change are Navy Retained Conditions as defined in section 206.*~~ If the SFRA transfers a portion of the ACES to another party, SFRA shall remain responsible for performing the Environmental Services on that portion. The SFRA shall ensure that the initial cap/covers required by the CERCLA RODs shall be installed throughout the ACES before transferring its final property interest within the ACES to a third party or ~~_____~~no later than seven (7) years after the date of execution of this Agreement

by both parties, whichever shall occur first.

b. The SFRA's obligation to perform Environmental Services is expressly conditioned upon the Navy providing funding for performing the Environmental Services in accordance with Section 302 hereof. However, to the extent that the Navy pays a portion of the funding set forth in Section 302 hereof, but fails to pay the full amount set forth in that Section, or in the event that the Agreement terminates pursuant to Section 1003 hereof, the SFRA's obligations shall be limited to only that portion of Environmental Services which have been performed by use of the funds actually provided by the Navy or the insurer as set forth in Section 712.~~B~~b hereof. Any dispute with respect to delineating the portion of the Environmental Services performed with the use of such partial funding shall be subject to dispute resolution pursuant to Section 1001 hereof. The SFRA shall make reasonable progress toward performing Environmental Services.

c. The SFRA shall conduct audits and shall provide performance and financial reports to the Navy in accordance with Section 301.~~e.~~f below.

d. The SFRA shall cause the performance of the Environmental Services in a manner that will not unreasonably delay any action that the Navy determines that it may undertake in order to address Navy-Retained Conditions.

e. The SFRA shall indemnify the Navy pursuant to the terms of Section ~~711.0~~ 711hereof.

f. Non-Federal Audits, Performance Reporting & Financial Reports.

(1) The SFRA is responsible for obtaining annual audits in accordance with the Single Audit Act Amendments of 1996 (31 USC 7501-7507) and revised OMB Circular A133, "Audits of States, Local Governments, and Non-Profit Organizations." The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits. The costs of audits made in accordance with this section are allowable costs under this Agreement.

(2) The SFRA is responsible for assuring compliance with applicable Federal requirements and that performance goals are being achieved. In accordance with 32 CFR 33.40, the SFRA shall submit timely performance reports to the Navy. All reports shall be submitted to the Navy on the same basis as the SFRA, its developer, or its contractors submit such information to the insurance provider.

(3) In accordance with 32 CFR 33.41, the SFRA shall submit timely financial status reports to the Navy. All reports shall be submitted to the Navy on the same basis as the SFRA, its developer, or its contractors submit such information to the insurance provider.

f. g. The SFRA shall provide the Navy notice within thirty (30) calendar days of receiving notice by Environmental Regulatory Agencies, or other third parties, of the existence of any conditionPollution Condition at the ACES that suggests that an action is necessary for which the SFRA is not responsible under this Agreement. If the SFRA is served with a complaint or written notice by an Environmental Regulatory Agency, the SFRA shall provide the Navy with a copy of such document no later than seven (7) calendar days following the service of such document.

g. Within thirty (30) calendar days of receiving actual notice of any condition at or affecting the ACES or that the SFRA discovers, for which the SFRA is not responsible under Section 302 hereof, the SFRA shall notify the Navy of such condition. The exception to this duty is that the SFRA shall notify the Navy of the discovery of any UXO, biological warfare agents, or radiological or chemical warfare agents within twenty four (24) hours of any such discovery. The Parties shall, within thirty (30) calendar days after such notification, and five (5) calendar days in the case of notification of UKO biological warfare agents, or radiological or chemical warfare agents meet and confer regarding any appropriate coordination that might be required in order to address the circumstances.

h. Notwithstanding the provisions of the preceding Section 301.e. hereof, but subject to the Navy's funding limitation as set forth in Section 401 hereof, the SFRA shall have the right, but not the duty, to take or cause to be taken the following actions within the ACES with respect to Navy Retained Conditions:

(1) Investigation Activities. Any activity necessary to determine the existence, nature, character and extent of conditions that may constitute Navy Retained Conditions.

(2) The SFRA shall notify the Navy within fifteen (15) business days after the SFRA takes or causes to be taken any action under Section 301.h.(1) hereof. If the Navy disputes an SFRA action taken under Section 301.h(1), the Navy may initiate dispute resolution procedures under Section 1001 hereof.i If the SFRA discovers a condition If the SFRA discovers a potential Pollution Condition in the ACES that the SFRA reasonably believes is a Navy-Retained Condition, the SFRA shall make an initial determination whether such conditionpotential Pollution Condition is in fact a Navy-Retained Condition before incurring such costs or obligations. If, despite using commercially reasonable efforts to avoid incurring such costs to take action it reasonably deems necessary and before it is able to meet and confer with the Navy in accordance with Section 302(h) below, the SFRA incurs uninsured costs or obligations with respect to a Navy-Retained Condition, the SFRA may seek reimbursement from the Navy, subject to the Navy's funding limitation as set forth in Section 401, hereof, and the dispute resolution provisions of Section 1001 hereof. Nothing in this Agreement shall be construed as a Navy promise or obligation to provide such reimbursement, provided, however that, subject to its funding limitations and the Anti-Deficiency Act, the Navy shall use its bestreasonable efforts to obtain funds to reimburse the SFRA for itsthe SFRA's

reasonable costs incurred under this Section ~~301 (g).~~301.g, if SFRA seeks reimbursement.

h. . Within thirty (30) calendar days of the either making a determination pursuant to 301.g or otherwise receiving actual notice that there is a Navy Retained Condition at or affecting the ACES, the SFRA shall notify the Navy of such condition. The exception to this duty is that the SFRA shall notify the Navy of the discovery of any UXO, biological warfare agents, or radiological or chemical warfare agents within twenty-four (24) hours of any such discovery. The Parties shall, within a reasonable time under the circumstances, meet and confer in consultation with the appropriate Environmental Regulatory Agency or Agencies, regarding any appropriate coordination that might be required in order to address the circumstances. As part of such meet and confer obligation, the Parties shall in good faith endeavor to agree as to whether such condition is within the scope of the Environmental Services or is a Navy-Retained Condition, and if a Navy-Retained Condition, whether the Navy or the SFRA will perform the work to address such Navy-Retained Condition, and if to be performed by the SFRA, identify the Navy's funding source and schedule of payment. If the Parties cannot agree whether a Pollution Condition constitutes a Navy-Retained Condition, or disagree about the action or funding required in response to any such condition, the matter may be submitted to dispute resolution under Section 1001.

i. Further language to allow the SFRA to react to mundane NRCs in an emergency or expedited context.

j. The SFRA shall provide to the Navy all information obtained or developed by the SFRA with respect to any Navy-Retained Conditions that the SFRA discovers.

k. The SFRA shall obtain the Environmental Insurance Policies, and other insurance required, as described in Section 712, herein.

l. The SFRA shall conduct annual site inspections ~~to ensure compliance with the Long Term Obligations by future transferees of the ACES and prepare~~pursuant to the LUC RD and CERCLA RODs, AOC, CRUP and deeds and shall assure preparation of any applicable compliance monitoring reports and certificates ~~as required under the LUC RD and CERCLA RODs (including Explanation(s) of Significant Differences and ROD amendments) and the AOC. The SFRA shall notify and obtain approval from the Navy, which approval shall not be unreasonably withheld, of any change in land use that is inconsistent with the use restrictions and assumptions contained in the CRUP or described in the CERCLA RODs (including Explanation(s) of Significant Differences and ROD amendments) , *which approval shall be based upon a determination that such change in use does not represent significant increase in risk to human health and the environment.* After receiving approval, for such use from the other signatories to the Amended FFA the SFRA shall notify and obtain approval from the Navy.~~associated with environmental restrictions on the use of the ACES.

Section 302. Obligations of the Navy

a. The maximum funding obligation of the Navy to the SFRA for performing the Environmental Services during the term of this Agreement is $_____, which shall be paid in one advance payment which shall be made within -- (--) days after recordation of the deed conveying title to the Early Transfer Property from the Navy to the SFRA. The Navy's obligation to pay hereunder is subject to the availability of appropriated funds and this shall not be interpreted to require obligations or payments by the Navy in violation of the Anti-Deficiency Act (31 U.S.C. 1341).

b. Notwithstanding the provisions of Section 302.a. above, prior to payment being made to the SFRA, the terms, conditions and insurer, as required by Section 712 below, and as set forth in a final indication of the Environmental Insurance Policies, must be reviewed and approved by the Navy and the SFRA, which approval shall not be unreasonably withheld.

~~c. Within thirty (30) calendar days after the SFRA has provided the Navy with:~~

~~(1) proper documentation establishing that Regulatory Closure has been obtained for the ACES, or portions of the ACES, as set forth in the AOC, and~~

c. ~~(2)~~ Within a reasonable time after the SFRA has provided the Navy with: proper documentation establishing that Regulatory Closure has been obtained for the ACES, or portions of the ACES, as set forth in the AOC, and a written request ~~from the SFRA~~ to issue the appropriate CERCLA warranty for the ACES, or such portions of the ACES, the Navy shall issue to the SFRA the warranty required under CERCLA, Section 120(h)(3)(C)(iii). The SFRA shall bear the costs of preparing any new legal descriptions for the CERCLA warranty to be recorded.

d. ~~Within a fifteen (15) after receiving any notice from the SFRA under Section 301.f. or 301.g. hereof, the Navy shall confer with the SFRA with regard to any Navy Retained Condition at issue giving priority to notices concerning the presence of UXO, biological warfare agents, chemical warfare agents or Radiological Materials. The Navy and the SFRA, in consultation with the appropriate Environmental Regulatory Agency or Agencies, shall (i) endeavor to agree upon a course of action. If the Parties cannot agree whether an environmental condition constitutes a Navy Retained Condition, or disagree about the action required in response to any such condition under CERCLA, the matter may be submitted to dispute resolution under Section 1001. Consistent with the provisions of above Section 301.h., including being subject to the Maximum Navy Funding Obligation as set forth in Section 401 hereof and the Dispute Resolution Provisions under Section 1001, the SFRA may take any actions deemed necessary, and seek reimbursement from the Navy for the costs associated with such actions.~~ The Navy shall comply with the procedures and terms set forth in Section 301 with respect to discovery of potential Pollution Conditions that may be Navy-Retained Conditions.

Except to the extent any portion of Ineligible Work is a Navy-Retained Condition, the Navy shall have no responsibility for Ineligible Work, and no funds provided under Section 302(a) may be used by the SFRA to fund Ineligible Work; provided, however, that nothing in this Agreement shall prohibit the SFRA, within its sole discretion, from performing Ineligible Work at the SFRA's own cost and expense.

d. ~~e.~~ Any Navy liability for the death of or injury to any person, or the loss of or damage to any property, caused by Navy use of the ACES shall be determined in accordance with the applicable provisions of the Federal Tort Claims Act (28 U.S.C. Section 2671, et seq., as amended), or as otherwise provided by law.

e. ~~f.~~ The Navy shall cause its performance of any activity with respect to Navy Retained Conditions or any other Pollution Condition for which the Navy has responsibility at or affecting the ACES to be conducted in a manner that will not unreasonably delay ~~the~~or interfere with SFRA's performance of the Environmental Services ~~or development of the Aces~~.

f.

A r t i c l e I V
FUNDING LIMITATION AND BUDGETING

Section 401. Navy's Funding Limitation

The Maximum Navy Funding Obligation for the Environmental Services to be performed by the SFRA under this Agreement is $ _____. Except as may otherwise be provided in Section 302 above, the Navy will not pay any Environmental Service costs that exceed the amount described in Section 302.a. above. The Navy's obligation to pay any costs hereunder is subject to the availability of appropriated funds. Nothing in this Agreement shall be interpreted to establish obligations or require payments by the Navy in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1341 et seq. The SFRA incurs any additional costs, including any costs for services or activities determined to be defined as Ineligible Work, at its own risk. Any statements in this Agreement regarding the SFRA's ability to seek reimbursement for any additional costs, or to negotiate any additional amounts to be paid, do not create a Navy obligation to pay such costs or amounts in excess of the Maximum Navy Funding Obligation~~, provided that the Navy use its best effort to obtain funds to reimburse SFRA pursuant to Section 301 (i)~~.

Notwithstanding any other terms herein, this Agreement is not intended to mean and shall not be interpreted to obligate the Navy to pay any amount to the SFRA in excess of the Maximum Navy Funding Obligation or to perform any remedial, response or other environmental action. The obligation, if any, to perform such remedial, response, or other environmental action shall be governed solely by applicable law. However, nothing herein precludes the Parties from entering into agreements to address other Navy obligations or activities.

INSERT THE UIC AND LINE OF ACCOUNTING HERE

Article V
PAYMENT SCHEDULE

Section 501. General

Subject to the Availability of funds, the SFRA shall be paid in accordance with Section 302 hereof.

Section 502. Payments

a. The amount provided by the Navy is an advance payment to be made to the SFRA. Such payment shall, upon execution by all Parties to this Agreement, be deposited into an interest bearing escrow account pending transfer of the advance payment to the SFRA in accordance with the Escrow Instructions set forth in Appendix --. Payment to the SFRA shall be made in accordance with the advance payment requirements of 32 CFR §33.21(c), as follows:

(1) The SFRA shall maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds from the escrow account to the SFRA and their disbursement by the SFRA to an independent third party payee.

(2) Within a reasonable period of time after receiving the advance payment from the escrow account, the SFRA shall deposit the funds with an independent third party payee ~~such as an insurer~~. Such independent third party payee shall be responsible for making all payments to a subsequent transferee and/or environmental contractor(s), with whom the SFRA enters into an agreement to perform the Environmental Services or to supervise the performance of the Environmental Services. Funds shall be considered disbursed by the SFRA when the following has occurred:

(A). The SFRA does not retain possession of the funds;

(B). The SFRA cannot get the funds back upon demand (this does not include allowable costs incurred by the SFRA for which the SFRA requests proper reimbursement from the independent third party payee);

(C). The independent third party payee is an independent stakeholder from the SFRA and the party or parties with whom the SFRA enters into an agreement to perform the Environmental Services or supervise the performance of the Environmental Services and not the agent of the SFRA;

(D). The SFRA receives something in exchange for the transfer of funds to the independent third party payee, such as a contractual promise to hold the funds and make payments in accordance with specified procedures.

(3) Any agreement by the SFRA with an independent third party payee must also include the above provisions and satisfy the requirements of 32 CFR §33.21(c).

(4) Interest. Any interest earned on the advance payment while in the escrow account pending transfer to the SFRA and any interest earned on the advance payment by the SFRA prior to the disbursement of those funds by the SFRA to the independent third party payee must be returned to the Navy in accordance with 32 CFR §33.21(h)(2)(i). However, any interest earned on those funds after disbursement from the SFRA to the independent third party payee in accordance with Section 502.a. (2)(A)-(D) are considered funds to be utilized for the purposes of this Agreement.

Article VI
PAYMENT

Section 601. RESERVED

Section 602. Relation to Prompt Payment Act.

This Agreement is not a contract as defined under OMB Circular A-125, which implements the Prompt Payment Act of 1982 (31 U.S.C. Section 3901, et seq.). Accordingly, the Navy is not liable to the SFRA for interest on any untimely payments under this Agreement.

Section 603. No Direct Navy Payment of SFRA Obligations

The Navy is not in privity with, and shall not directly pay any SFRA contractors, employees, vendors, or creditors for any costs incurred by the SFRA under this Agreement. The Navy assumes no liability for any of the SFRA's contractual obligations that may result from any SFRA performance of duties under this Agreement. The Navy assumes no liability hereunder for any SFRA contractual obligations to any third parties for any reason. The SFRA hereby agrees to defend and hold the Navy harmless from any such liabilities.

Article VII
GENERAL PROVISIONS

Section 701. Term of Agreement

Unless terminated under Section 1003 below, this Agreement shall remain in effect until Regulatory Closure within the ACES has been obtained. ~~Only the following two terms of this Agreement~~The requirements and provisions described in Subsections 701.a and 701.b below shall survive such termination, ~~and then~~but only if the Agreement is not terminated as a result of the Navy's failure to provide the funds specified in Section 401 above~~ or other Navy default~~:

a. SFRA requirements to maintain compliance with Regulatory Closure and any applicable Long-Term Obligations including but not limited to those required under the CERCLA RODs, PCAPs, and AOC;

b. the SFRA's and the Navy's obligations under Section 711 below (including the relevant provisions of Sections 101, 102, 301.A, 302, 703, 706, 707, and 801 cross-referenced in Section 711), and~~; (iii)~~ Section 715.

Section 702. Amendment of Agreement

Only a written instrument signed by the parties hereto may amend this Agreement.

Section 703. Successors and Assigns

All obligations and covenants made by the parties under this Agreement will bind and inure to the benefit of any successors and assigns of the respective parties, whether or not expressly assumed by such successors or assigns, and may not be assigned in whole or in part without the written consent of the other party.

Section 704. Entire Agreement

This Agreement constitutes the entire Agreement between the parties. All prior discussions and understandings on this matter are superseded by this Agreement.

Section 705. Severability

If any provision of this Agreement is held invalid, the remainder of the Agreement will continue in force and effect to the extent not inconsistent with such holding.

Section 706. Waiver of Breach

No Party shall be deemed to have waived any material provision of this Agreement upon any event of breach by the other party, and no "course of conduct" shall be considered to be such a waiver, absent the waiver being documented in a mutually signed writing.

Section 707. Notices

Any notice, transmittal, approval, or other official communication made under this Agreement will be in writing and will be delivered by hand, facsimile transmission, electronic mail, or by mail to the other party at the address or facsimile transmission telephone number set forth below, or at such other address as may be later designated:

With Regard to the Navy:

Director, Base Realignment and Closure Management Office
Department of the Navy
1455 Frazee Road, Suite 900
San Diego, CA 92108

With a copy to:

With Regard to the SFRA:

San Francisco Redevelopment Agency
One South Van Ness Avenue
Fifth Floor
San Francisco, CA 94103
Attn: _____

With a copy to:

Celena Chen, Senior Attorney
San Francisco Redevelopment Agency
One South Van Ness Avenue
Fifth Floor
San Francisco, CA 94103

With a copy to:

Elaine Warren, Assistant City Attorney
Office of City Attorney
City of San Francisco City Hall
Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682

With a copy to:

George R. Schlossberg, Esq.
Kutak Rock LLP
1101 Connecticut Avenue, N.W.
Washington, D.C. 20036

Section 708. Conflict of Interest

The SFRA shall ensure that its employees are prohibited from using their positions for a purpose that is, or gives the appearance of being, motivated by a desire for private gain for themselves or others.

Section 709. Access to and Retention of Records

The SFRA shall afford any authorized representative of the Navy, DOD, the Comptroller General, or other Federal Government agency access and the right to examine all SFRA records, books, papers, and documents related to the SFRA's performance under this

Agreement and any additional records, book papers and documents that are otherwise required to be retained under the AOC. This includes all such records in automated forms ("Records") that are within the SFRA's custody or control, and that relate to its performance under this Agreement. This right of access excludes any attorney-client communications, attorney work product, or any other legally privileged documents. The SFRA shall retain required records intact in their original form, if not the original documents, or in another form if the Navy approves. Such approval shall not be unreasonably withheld. SFRA record retention requirements shall extend for at least three (3) years following the completion or the termination of this Agreement. The SFRA shall allow the Navy access to the SFRA's records during normal business hours. The Navy will give the SFRA seventy-two (72) hours prior notice of its intention to examine the SFRA's records, unless the Navy determines that more immediate entry is required by special circumstances. Any such entry shall not give rise to any claim or cause of action against the Navy by the SFRA or any officer, agent, employee, or contractor thereof.

Section 710. Change of Circumstances

Each Party will promptly notify the other Party of any legal impediment, change of circumstances, pending litigation, or any other event or condition that may adversely affect such Party's ability to perform this Agreement.

Section 711. Liability and Indemnity, Waiver and Release

a. The SFRA's Obligations and Limited Waiver of Statutory Rights

(1) In consideration of the Navy's payment to the SFRA under Section 302 above, and the other applicable terms of this Agreement, the SFRA agrees that it shall, upon receipt of the payment of the grant award, indemnify and hold the Navy harmless for any of the following, provided, however the SFRA's indemnification obligations under this subparagraph (1)(a) shall in no event apply to Navy-Retained Conditions ~~or~~which are Uninsured ~~Unknown~~ Conditions:

(A) any claims incurred in responding to ~~environmental conditions~~Pollution Conditions in the ACES ~~and~~which are within the scope of Environmental Services; or address otherwise any "Ineligible Work" as set forth in Section 218 performed by or on behalf of the SFRA;

(B) oversight costs for any remedy implemented by the SFRA to the extent that the SFRA is required to install such remedy to achieve Regulatory Closure under this Agreement;

(C) all claims for personal injury or property damage to the extent caused by the SFRA or its contractors in the course of performing the Environmental Services;

(D) all natural resource damage claims pursuant to 42 U.S.C. Section 9607(a)(4)(C) pertaining to releases of hazardous substances, but only to the extent that such damages were caused, or contributed to, by the negligent or wrongful actions of the SFRA, its contractors or its successors in interest;

(E) all costs arising from the ~~negligent~~ performance of the Environmental Services which SFRA performs or causes to be performed;

(F) all costs of additional remediation required on or within the ACES as a result of a change in land use from that upon which the initial remedial action selection decision was based when Regulatory Closure was completed;

(G) all costs associated with the correction of any failure of any Navy-selected remedy implemented by the SFRA, but only to the extent such costs are directly attributable to the poor workmanship or negligence of the SFRA or its contractors in the performance of said implementation;

(H) all costs arising from the correction of any failure of any remedy both selected and implemented by the SFRA; and

(I) all costs arising from or associated with claims addressed in the Waiver, Release and Covenant Not to Sue provisions set forth in Section 711.A(6) below.

(2) With regard to the ACES, the Parties agree that the SFRA has provided financial assurances reasonably acceptable by the Navy to meet the requirements of 42 U.S.C. Section 9620(h)(3)(C)(ii).

(3) Except as otherwise expressly provided by this Agreement, this Agreement shall not be construed to limit, expand or otherwise affect any right that the SFRA may have, in the absence of this Agreement, to take legal action to require the Navy to act with respect to Navy-Retained Conditions, or to seek damages resulting from the Navy's performance or failure to perform any actions with respect to Navy-Retained Conditions. Except as otherwise expressly provided by this Agreement, this Agreement shall also not be construed to limit, expand or otherwise affect any right that the Navy may have, in the absence of this Agreement, to take legal action against the SFRA.

(4) Nothing in this Section creates rights of any kind in any person or entity other than the Navy and the SFRA.

(5) The SFRA and the Navy agree that the Environmental Services to be caused to be performed by the SFRA in accordance with the terms of this Agreement does not include any work relating to, nor is the SFRA responsible for indemnification of the Navy for

any work related to, Navy-Retained Conditions.

(6) Waivers, Releases, and Covenants Not to Sue. In consideration of the Navy's payment to the SFRA under Section 302 above, and the other applicable terms of this Agreement and as an administrative settlement of past ~~*[are there any past issues known at this time?]*~~, present, and future claims or causes of action ("claims"), the SFRA, upon receipt of payment, waives, releases, and covenants not to sue or otherwise pursue any cost, claim or liability against the Government relating to:

(A) Any cleanup, response or corrective action associated with or as a result of ~~Known Conditions; Insured Unknown Conditions;~~ Cost Cap Insured Conditions and Additonal Insured Conditions environmental within the scope of Environmental Services and;~~;~~

(B) Any consequential damages related to development delays caused by the Navy's performance of, or failure to perform, investigation or remediation activities with respect to Navy-Retained Conditions; and

(C) Any cost of redeveloping, reconstructing, altering, repairing, or replacing any "initial" cap/cover or containment remedial action constructed pursuant to a CERCLA ROD, ~~whether or not such activity is addressed in subsequent CERCLA RODs or CAPs, a CERCLA ROD Amendment, an Explanation of Significant Differences ("ESD"), or through a review and approval process by the United States of America and/or State of California pursuant to a Risk Management Plan or CERCLA IC review and approval procedure~~except to the extent such disturbance or alteration is necessary to comply with the AOC as a result of potential or actual remedy failure, or as a result of addressing Pollution Conditions other than those addressed by the cover, cap or other environmental remedy. . In no event shall SFRA be entitled to payment for claims, costs or damages for work or costs incurred pursuant to ~~*tise*~~this Agreement for which it has already been paid pursuant to this Agreement.

(D) Any personal injury or property damage to the extent that it did not ~~accrue propr~~occur prior to the date of execution of this agreement by both parties.

Section 712. Liability and Insurance

a. The SFRA shall either self-insure, or carry and maintain general liability insurance, to afford protection with limits of liability in amounts not less than $5,000,000.00 in the event of bodily injury or death to any number of persons in any one accident.

~~**b.** The SFRA agrees to bind subsequent to the execution of this Agreement, and with an effective date of conveyance, Environmental Insurance Policies with reasonably acceptable terms, conditions and coverages to the Navy which shall include both a Cleanup Cost Cap Policy~~

~~("Cost Cap Policy") for cost overruns associated with the performance of the Environmental Services and a Pollution Legal Liability Insurance Policy ("PLL Policy"), or similar coverage or coverages, and issued by an insurance carrier that is rated A.M. Best's or better, substantially similar to the Environmental Insurance Policies shown in Appendix 4. Such Policy or Policies will provide that the insurer waive its right of subrogation against the Navy, its officers, agents, or employees. In no circumstances will the SFRA be entitled to assign to any third party any rights of action that the SFRA may have against the Navy under this Agreement, subject to the provisions of Section 711.above. The Navy shall be listed as an Additional Insured with respect to the coverage provided in any Environmental Insurance Policy or Policies. The Navy shall not otherwise be deemed an insured of, nor have any rights with respect to, any other grant of coverage under the Environmental Insurance Policies. [Availability of such Policy or Policies?]~~

~~c. **RESERVED for additional specific environmental insurance language to be developed.**~~

b. ~~d.~~ The SFRA will either self-insure or carry and maintain worker's compensation or similar insurance in the form and amounts required by law. If a worker's compensation or similar insurance policy is obtained, any such insurance policy will provide a waiver of subrogation of any claims against the Navy, its officers, agents, or employees. In no circumstances will the SFRA be entitled to assign to any third party rights of action that the SFRA may have against the Navy.

c. ~~e.~~ General Liability Policy Provisions: All general liability insurance which the SFRA carries or maintains, or causes to be carried or maintained, under this Section 712 will be in such form, for such amounts, for such periods of time and with such insurers as the Navy may reasonably approve. Such Navy approval shall not be unreasonably withheld or delayed. All policies issued for general liability insurance required by this Agreement will provide that no cancellation will be effective until at least thirty (30) days after the Navy receives written notice thereof. Any such policy shall also provide a waiver of subrogation of any claims against the Navy, and its officers, agents, or employees. In no circumstances will the SFRA be entitled to assign to a third party any rights of action which the SFRA may have against the Navy. The Navy acknowledges and accepts the SFRA's self-insurance coverage for general liability, worker's compensation, or for any similar coverage.

d. ~~f.~~ Delivery of Policies: The SFRA will provide the Navy with a certificate of insurance or statement of self insurance evidencing the insurance required for the SFRA. At least thirty (30) days before any such policy expires, the SFRA shall also deliver to the Navy a certificate of insurance evidencing each renewal policy covering the same risks.

e. Environmental Insurance Requirements. Prior to the conveyance of any portion of the ACES to SFRA, SFRA shall procure environmental insurance policies approved by the Navy, which approval shall not be unreasonably withheld, providing “cost cap” or “stop loss” coverage for cost overruns associated with implementing the work required by the CERCLA

RODs and further providing pollution legal liability or similar coverage, to the extent available, for Pollution Conditions not addressed by the CERCLA RODs and for third party liability claims associated with Pollution Conditions. .

f. A Certificate of Insurance shall be furnished to the Naval Facilities Engineering Command Grants Officer on an annual basis evidencing the above insurance coverage is bound.

Section 713. Reports

To assure that the Navy will receive from the SFRA the appropriate documentation necessary for the Navy to execute the CERCLA covenant, the Navy may request that the SFRA provide additional information concerning the environmental condition of the ACES reasonably necessary to enable the Navy to execute the CERCLA covenant. As soon as possible after any such request is made, if the SFRA can reasonably obtain and release such information, the SFRA shall provide the Navy access to any documents containing such requested information. In any event, the SFRA agrees to provide the Navy such access within ten (10) business days of the Navy's information request.

Section 714. Officials Not to Benefit

The SFRA acknowledges that no member or delegate to the United States Congress, or Resident Commissioner, shall be permitted to share in any part of this Agreement, or receive any benefit that may arise therefrom.

Section 715. Representations

a. The Navy represents that:

(1) it is fully authorized to enter into this Agreement;

(2) the SFRA may rely on the data provided to the SFRA or its contractors by the Navy or the Navy's contractors for purposes of performing the Environmental Services and making any disclosures required under applicable law; and

(3) the information provided to the SFRA by the Navy hereunder fairly and accurately represents the Navy's actual knowledge of the nature and extent of contamination within the ACES.

b. The SFRA represents that:

(1) it is a local reuse organization approved by the City in accordance with Section 2824 (a) of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510), as amended, and is fully authorized to enter into this Agreement; and,

(2) it enters into this Agreement cognizant of the requirements and prohibitions set forth in the Anti-Deficiency Act, and,

(3) any provision of this Agreement that states or implies that the Navy will reimburse the SFRA for any costs incurred, or that the Navy will perform any actions with respect to Navy-Retained Conditions, are wholly subject to the Anti-Deficiency Act.

Section 716. Excess Funds

Funds, as provided for in Section 401 and Section 502 above, are only to be expended for the purposes for which they were provided for under the terms of this Agreement. In accordance with the procedures outlined in 32 CFR 33.50, any funds paid to the SFRA that remain unencumbered for allowable costs, after all regulatory approvals have been obtained and the CERCLA warranty has been issued by the Navy, are funds which may be determined to be excess by the Navy and not authorized to be retained by the SFRA and upon written demand by the Navy, the SFRA must immediately refund to the Navy those excess funds.

A r t i c l e V I I I
APPLICABLE LAWS AND REGULATIONS

Section 801. Applicable Law

This Agreement is entered into incident to the implementation of a Federal program. Accordingly, as it may affect the rights, remedies, and obligations of the United States, this Agreement will be governed exclusively by, and be construed only in accordance with Federal law.

Section 802. Governing Regulations

This Agreement shall be enforced and interpreted in accordance with the Federal laws and regulations, directives, circulars, or other guidance cited in this Agreement. This Agreement will be administered according to the following authorities: DoD Directive 3210.6; the Uniform Administrative Requirements for Grants and Cooperative Agreements; other applicable portions of Title 32 of the Code of Federal Regulations, and pertinent OMB Circulars. If the provisions of this Agreement conflict with any such authorities, those authorities will govern.

Section 803. Environmental Protection

Each Party agrees that its performance under this Agreement shall comply with all applicable state, Federal and local environmental laws and regulations.

A r t i c l e I X
PROCUREMENT

Section 901. SFRA Contracts

The SFRA's acquisition of goods and services to perform this Agreement will comply with the instructions and procedures contained in 32 CFR Section 33.36(b)(1) through (12). The SFRA must not contract with any party that is debarred, suspended, or otherwise excluded from, or ineligible for, participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension," and applicable DOD regulations thereunder.

Section 902. Preference for Local Residents

a. Preference is allowed in entering into contracts with private entities for services to be performed at a military installation that is affected by closure or alignment under a base closure law. The Secretary of Defense may give preference, consistent with Federal, State, and local laws and regulations, to entities that plan to hire, to the maximum extent practicable, residents of the vicinity of such military installation to perform such contracts. Contracts for which the preference may be given include contracts to carry out environmental restoration activities or construction work at such military installations. Any such preference may be given for a contract only if the services to be performed under the contract at the military installation concerned can be carried out in a manner that is consistent with all other actions at the installation that the Secretary is legally required to undertake.

b. Definition. In this section, the term "base closure law" means the following:

(1) The provisions of title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526; 10 U.S.C. 2687 note).

(2) The Defense Base Closure and Realignment Act of 1990, as amended (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note).

c. Applicability - Any preference given under subsection (a) shall apply only to contracts entered into after the base closure law was enacted.

Article X
TERMINATION, ENFORCEMENT, CLAIM AND DISPUTE RESOLUTION

Section 1001. Dispute Resolution

a. Except as otherwise provided in this Agreement, these dispute resolution provisions are the sole recourse of any Party with respect to disputes and the enforcement of any terms of this Agreement.

b. A dispute shall be considered to have arisen when one Party sends the other Party written notice of such dispute. Such written notice will include, to the extent available, all of the following information: the amount of monetary relief claimed or the nature of other relief requested; the basis for such relief, and; any documents or other evidence pertinent to the claim.

c. If a dispute arises under this Agreement, the Parties agree to attempt to resolve the dispute at the staff level. The Parties shall confer at the staff level within fifteen (15) days after a notice of dispute is received. Should staff-level discussions not resolve the dispute within such fifteen (15) day period (or longer, if agreed to by the Parties), the Parties agree to elevate the dispute to designated mid-level management. Mid-level management shall then attempt to resolve the dispute within thirty (30) days (or longer, if agreed to by the Parties) after receiving the dispute. If Mid-level management cannot timely resolve the dispute, the Parties agree to then raise the issue with their respective senior-level management. Senior -level management shall then attempt to resolve the dispute within thirty (30) days (or longer, if agreed to by the Parties) after receiving the dispute. Each Party shall have the discretion to determine the person(s) to represent it at any meeting convened under this section.

d. If the dispute cannot be resolved after exhausting the remedies under Section 1001c. above, the dispute shall be appealed to the Director of the Base Realignment and Closure Office at the address indicated in Section 707 above. Such appeal must be written, and contain all of the documentation and arguments necessary for a decision. The Director shall render a decision in a timely manner. If the SFRA disagrees with the Director's decision, the SFRA may, by providing notice to the other Party, pursue whatever remedies that the SFRA may have available at law or in equity.

e. To the extent that there is a conflict between the Dispute Resolution provisions or process set forth herein and any dispute resolution provisions or process contained in the Amended FFA, the dispute resolution provisions and process of the Amended FFA shall control.

Section 1002. Enforcement

Either party may enforce this Agreement according to its terms. Without limiting either

party's enforcement rights, in accordance with the terms of 32 CFR Section 33.43, Enforcement, for noncompliance of Grantee or subgrantee shall include:

a. Temporarily withholding cash payments pending correction of the deficiency by the SFRA or Sub-grantee or more severe enforcement action by the awarding agency;

b. ~~a.~~ Disallowing (denying both use of funds and matching credit for) all or part of the cost of the activity or action that is not in compliance;

c. ~~b.~~ Wholly or partly suspending or terminating the current award for the SFRA's or the Sub-grantee's program. Any award termination will be conducted under Section 1003 below.

d. ~~c.~~ Withholding further awards under this Agreement; and

e. ~~d.~~ Taking other remedies that may be legally available.

Section 1003. Termination

a. This Agreement may terminate by its own terms under Section 701 above, or by a party under this Section 1003.

b. Reserved.

c. Reserved.

d. If a Party materially breaches this Agreement, the non-breaching party, to preserve its right to terminate, must provide the breaching party with a notice of intent to terminate. The breaching party shall have thirty (30) days to cure the breach, unless a longer period is agreed upon, in writing, by the parties. If the breaching party fails to cure the breach within the thirty (30) day (or longer, if agreed upon) period, then the non-breaching party may, in its discretion, terminate this Agreement no sooner than sixty (60) days after the cure period has expired. The existence of a material breach shall be finally determined under the dispute resolution procedures specified in Section 1001 above. Notwithstanding anything to the contrary in this Section 1003.d, the breaching party shall have ten (10) days to cure a breach that arises from any failure to make a required payment under this Agreement.

e. If this Agreement is terminated for reasons other than those set forth in Section 701 above, the SFRA shall immediately:

(1) Stop work;

(2) Place no further subcontracts or orders (referred to as subcontracts in this

clause) for materials, services, or facilities;

(3) Terminate all subcontracts;

(4) With approval or ratification to the extent required by the Navy, settle all outstanding liabilities and termination settlement proposals arising from the termination of any subcontracts; any such approval or ratification will be final;

(5) Take any action that may be necessary to protect human health or the environment against imminent and substantial endangerment thereto, or to protect and preserve any Navy-owned property at the ACES, as the Grant Officer may direct; and

(6) Return or cause to be returned to the Navy any funds held by the SFRA or the Escrow Agent not otherwise committed for allowable costs of payment for Environmental Services performed in accordance with this Agreement.

The SFRA agrees to insert such provisions in its contracts, and to require that such provisions be placed in any subsequent subcontracts between the SFRA's contractors and their subcontractors, so as to effect the provisions above.

f. If this Agreement is terminated under this Section 1003, the status of the parties with respect to ~~environmental conditions~~Pollution Conditions at the ACES shall revert to ~~as~~ the status that existed immediately preceding the effective date of this Agreement.

g. A party's right to terminate, and any determination of funds available for reimbursement, under this Section 1003 shall be subject to the dispute resolution procedures in Section 1001 above.

Section 1004. Effects of Suspension and Termination

a. Except for allowable costs in accordance with 32 CFR Section 33.22 and the applicable OMB Circulars, any costs to the SFRA resulting from obligations incurred by the SFRA during a suspension, or after termination of payments, are not allowable unless the Navy expressly authorizes them in the notice of suspension or termination, or subsequently authorizes such costs. Any other SFRA costs incurred during suspension or after termination which are necessary and not reasonably avoidable are allowable only if:

(1) the costs result from obligations which were properly incurred by the SFRA before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, cannot be cancelled; and

(2) the costs would be allowable if the Agreement were not otherwise suspended or expired at the end of the funding period in which the termination takes effect.

b. The enforcement remedies specified in this section do not relieve the SFRA or its subcontractors from compliance with 32 CFR Section 33.35, Subpart C, or 32 CFR Part 25, including the restrictions on entering into a covered transaction with any party which is debarred, suspended, or is otherwise excluded from, or ineligible for participation in, Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

Article XI
LEGAL AUTHORITY

Section 1101. Legal Authority

The parties hereby represent and warrant that they are under no existing or reasonably foreseeable legal disabilities that would prevent or hinder them from fulfilling the terms and conditions of this Agreement. The parties will promptly notify each other of any legal impediment that arises during the term of this Agreement that may prevent or hinder the party's abilities to perform its duties under this Agreement.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties to this Agreement, by their authorized representatives, hereby cause this Agreement to be executed.

SAN FRANCISCO REDEVELOPMENT AGENCY

By: _____
NAME:
TITLE: Director

Dated: _____

THE UNITED STATES OF AMERICA

By: _____
Mr. Robert Griffin
Assistant Commander for Acquisition, Naval Facilities Engineering Command

Dated: _____

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